University of Alberta

Losing the Game: Wildlife Conservation and the Regulation of First Nations Hunting in Alberta, 1880-1930

by

Brian Louis Calliou ©

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements for the degree of Master of Laws

Faculty of Law

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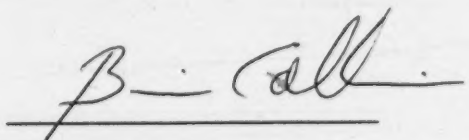

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The undersigned certify that they have read, and recommended to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled Losing the Game: Wildlife Conservation and the Regulation of First Nations Hunting in Alberta, 1880-1930 submitted by Brian Louis Calliou in partial fulfillment of the requirements for the degree of Master of Laws.

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Abstract

This thesis examines the historical dynamics around how First Nations hunters came to be regulated in Alberta in the period around the turn of the century. Alberta, before it gained provincial status, was part of the North West Territories, which passed their own game regulations. After 1905, Alberta passed its own game laws. During this whole period, local sportsmen lobbied for local game laws to apply to First Nations. Was conservation of game the only impetus for the creation of game laws in Alberta? Or, were their other values being supported by game laws and their enforcement?

The importance of hunting to two different cultures resulted in a conflict over scarce wildlife resources. Sportsmen's values won out over the values placed on wildlife by First Nations. The law and policy with respect to hunting reflected the sportsmen's values and eventually saw First Nations hunters come under, first territorial, and later provincial, game laws notwithstanding the fact that First Nations fell under the exclusive jurisdiction of the Dominion Government and the fact that First Nations had entered into treaties under which they were assured that their traditional livelihoods would be protected.

Dedication

I would like to dedicate this thesis to my wife Cora, my daughter Carly, and my son Drew.

Acknowledgements

I would like to acknowledge the assistance of the following persons. First, my thesis supervisor, Catherine Bell who helped me to focus, and refocus my topic and helped to clarify my arguments. Second, my thesis committee members, Bruce Ziff and Frank Tough. Last, but certainly not least, I would like to acknowledge the help and support of my partner in life, Cora Voyageur, and the support of my daughter Carly and my son Drew.

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Chapter 1

1.0 Introduction

Hunting and fishing rights are significant to Canada's First Nations. Indeed, a review of the *Canadian Native Law Reporter,* the leading reporter series on Aboriginal and Treaty rights jurisprudence, illustrates the effort exerted in defending charges arising from hunting and fishing regulations by First Nations and Metis communities and members.[1] The importance placed on hunting and fishing rights by the Aboriginal community is further illustrated by the number of cases appealed to the Supreme Court of Canada.[2] Legal appeals are lengthy and costly. Yet, First Nations and Metis communities are often willing to devote time and resources to seek protection of their rights to hunt and fish at superior courts.[3]

The Canadian justice system is criticized for the way it deals with Aboriginal peoples. Many studies show that Aboriginal peoples are over-represented in our criminal justice system.[4] One area in which Aboriginal peoples continually come in conflict with the legal system is

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[1] The *Canadian Native Law Reporter* is published by the Native Law Centre at the University of Saskatchewan. A review of CNLR articles from 1990 to 1999 highlight 80 hunting cases and 73 fishing cases. It should also be noted that many cases, especially at the lower courts, were not reported.

[2] Approximately half, that is, 82 of the hunting and fishing cases in the CNLR, are appeal level decisions, 11 were heard and decided by the Supreme Court of Canada.

[3] Test case funding is available through the Federal Department of Justice for some appeal cases, however, the rates paid are well below the legal fees generally charged by lawyers. Nevertheless, First Nations, Metis or their members must be willing to inject substantial costs in pursuing litigation of hunting rights.

[4] Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Queen's Printer, 1991); Nova Scotia, *Royal Commission on the Donald Marshall Jr. Prosecution* (Halifax: Province of Nova Scotia, 1989); Canada, *Report of the Royal Commission on Aboriginal Peoples*, 6 Vols. (Ottawa: Canada Communication Group, 1996)(Co-Chairs: R. Dussault and G. Erasmus).

with respect to fish and wildlife offences. In recognition of this fact, the Cawsey Commission, which reviewed the impact of the criminal justice system upon the Indian and Metis People of Alberta, recommended that:

> **The historical discussions between representatives of the Government of Alberta, the Indian Association of Alberta and the Metis Association of Alberta should be initiated by the government at the earliest possible date for the following purposes:**
>
> **(a) to discuss the problems arising out of the provisions of The Wildlife Act, related statutes and their enforcement;**
>
> **(b) to bring about a more equitable interpretation of the rights of the Indian implicit in the Indian treaties with respect to hunting, fishing and trapping;**
>
> **(c) to effect changes in The Wildlife Act and related statutes that will reflect that interpretation and accord recognition to the corresponding needs of Metis.**[5]

Reports by Canadian legal associations also recognize problems arising from the enforcement of fish and wildlife legislation against Aboriginal peoples attempting to exercise their treaty rights to pursue a traditional livelihood by hunting, fishing and trapping.[6] An Indigenous Bar Association committee published a paper that assessed the *Criminal Code*[7] and Aboriginal peoples and which states that criminal courts are not the proper forum for determining treaty and Aboriginal hunting rights.[8]

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[5] Alberta, *Justice On Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta, Vol. III Working Papers and Bibliography* (Edmonton, Solicitor General, 1991) (Chairman: Justice A. Cawsey) at 3-23.

[6] For example, see Canadian Bar Association, *Aboriginal Rights in Canada: An Agenda For Action* (Ottawa: Canadian Bar Association, 1988), which found that treaty hunting and fishing rights need to be respected.

[7] *Criminal Code*, R.S.C. 1985, c. C-46, s.6.

[8] Leonard Mandamin, Dennis Callihoo, Albert Angus and Marion Buller, "The Criminal Code and Aboriginal Peoples" (1992) Special Edition *British Columbia Law Review* 5 at 28.

The conflict which has erupted between hunting rights and the need for wildlife regulation is also illustrated by attitudes and actions of fish and wildlife officers, and sportsmen groups. The former take the view that First Nations hunters and fishers ought not to have "preferential rights" and feel that First Nations use wildlife irresponsibly.[9] The latter group also feels that there should be no differential treatment of First Nations hunters with respect to the application of game regulations. However, First Nations firmly believe that they have special rights based on their historical and constitutional relationship with the Canadian government. They feel strongly that the treaties they entered into are sacred and solemn agreements which protect their rights to a traditional livelihood.[10] Contrary to these agreements, game laws are imposed on First Nations that result in their traditional ways of life becoming criminalized.[11]

Litigation over hunting rights of First Nations in the prairie provinces stems from the hunting clauses in the *Natural Resources*

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[9] R.M. Alison, "Native Rights And Wildlife: An Historical Perspective" (1977) 25 *Chitty's Law Journal* 235 at 237 where Mr. Alison, a bureaucrat with the Ontario Ministry of Natural Resources, argued "Nonetheless, the stigma of guilt among Canadians is deeply entrenched, primarily as a result of Christian influence. Basically, the sympathy for preferential rights for native people comprises an expression of 'feeling' which cannot be justified by rational argument or evidence, and thus involves merely an unreasoned taste. Truth is disputable, feeling is not". He later continued his argument at 237 against First Nations hunting rights by essentially stating that First Nations used wildlife irresponsibly - only they did not always do so: "It would be erroneous to infer that native people always used wildlife irresponsibly".

[10] Chief John Snow, "Identification and Definition of Our Treaty and Aboriginal Rights" in Menno Boldt and J. Anthony Long, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 41 at 42 states "I remind all treaty and registered Indians that the treaties are sacred covenants; they are binding documents; and they must not be altered unilaterally by the government of Canada".

Transfer Agreements[12] (*NRTAs*), which, despite the lack of historical evidence, have been interpreted by our courts as having modified the treaty promises of maintaining a traditional livelihood. Section 12 of the *NRTA* gave recognition and protection to First Nations right to hunt and fish, although it referred in the proviso to "for food" purposes only. *NRTAs* were negotiated by the provincial governments of Manitoba, Saskatchewan and Alberta and the Dominion Government of Canada. The federal government did not consult the First Nations although they had a fiduciary-like obligation to protect First Nations, their property, and their treaty rights.[13] The concept of fiduciary duty that we have today would not be the same idea of duty to First Nations they had back then. However, the Dominion Government understood that it had some constitutional obligation to the First Nations by virtue of s. 91(24) of the

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[11] Frank Tough, "Game Protection and the Criminalization of Indian Hunting in Ontario, 1892-1931" (research paper, Ontario Native Affairs Secretariat, June 1994) [unpublished].

[12] At the federal level, Parliament passed the *Alberta Natural Resources Act*, S.C. 1930, c.3; *Saskatchewan Natural Resources Act*, S.C. 1930, c. 41; *Manitoba Natural Resources Act*, S.C. 1930, c.29. At the provincial level, each Legislatures passed their own *Acts*: the *Alberta Natural Resources Act*, S.A. 1930, c. 21; *Saskatchewan Natural Resources Act*, S.S. 1930, c.87; *Manitoba Natural Resources Act*, S.M. 1930, c.30. At the Imperial level, Parliament in London passed the *British North America Act, 1930* (U.K.), c.26. These agreements are generally referred to as the Natural Resources Transfer Agreement, 1930 (*NRTA*) and the content in each of them is similar.

[13] Frank Tough, "Introduction to Documents: Indian Hunting Rights, Natural Resources Transfer Agreements and Legal Opinions From the Department of Justice" (1995) 10:2 *Native Studies Review* 121at 121 states that "The inclusion of Indian hunting rights in this agreement indicates that there had been serious problems of provincial encroachment upon Indian hunting and that the federal government was aware that it had certain general obligations or trusts that would have to be protected with the transfer of jurisdiction". A fiduciary arises when one person or institution holds the property of another or because of a special relationship between the parties. The Dominion government was given jurisdictional authority over "Indians and lands reserved for Indians" and hold power over First Nations and their lands. Therefore, it is in a fiduciary role and owes a duty to look out for the best interests of First Nations. For legal analysis of the fiduciary duty, see *Guerin v. The Queen* (1984) 13 D.L.R. (4th) 321 and *R. v. Sparrow* [1990] 3 C.N.L.R. 160. See also Richard H. Bartlett, "You Can't Trust the Crown: The Fiduciary Obligation of the Crown to the Indians: Guerin v. The Queen" (1984-1985) 49 *Saskatchewan Law Review*

BNA Act, 1867. Instead of consulting First Nations, federal Justice Department officials consulted the Department of Indian Affairs to discuss the interest of "their Indians".[14] After many years of negotiations, the provinces and the federal government agreed to protect First Nations traditional livelihoods by agreeing to the hunting clause expressed in s. 12 of the Alberta *NRTA*:

> In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied lands and on any other lands to which the said Indians may have a right of access.[15]

This constitutional amendment gave official recognition to First Nations' hunting rights. It also delegated authority to regulate Indian hunting and trapping, including treaty rights, which previously fell within the exclusive jurisdiction of the federal government under s. 91(24) of the *Constitution Act, 1867*[16] to the provincial legislatures.[17] The

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367 and Leonard I. Rotman, "Provincial Fiduciary Obligations to First Nations: The Nexus Between Governmental Power and Resposibility" (1994) 32 *Osgoode Hall Law Journal* 735.

[14] Frank Tough, "The Natural Resources Transfer Agreements and Indian Livelihood Rights, ca. 1925-1933" (draft report, Public Interest Law Centre, Winnipeg, 1998) [unpublished].

[15] *Alberta Natural Resources Act*, S.C. 1930, c.3. Future references to the *NRTA* refer to this *Act* and specifically to this section, that is, the hunting clause.

[16] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, Ap II, No. 5. Section 91(24) provided exclusive jurisdiction to the federal government over "Indian and lands reserved for Indians".

[17] The delegation of legislative authority was addressed by the Judicial Committee of the Privy Council in the 1883 decision of *Hodge v. The Queen* (1883) 9 Appeal Cases 117. The Privy Council rejected an argument that the Dominion Government of Canada was merely a delegate of the Imperial Parliament in Britain that could not further delegate, that is, subdelegate its powers. The Privy Council found that the *Constitution Act, 1867* gave both the Dominion Parliament and the Provincial Legislatures powers "as plenary and ample" as the Imperial Parliament. Further, although the treaty text anticipated some

terms of the treaty documents themselves also gave exclusive jurisdiction to the federal government over the regulation of "Indian" hunting. The rights of First Nations to hunt, fish and trap could also be affected by provincial legislation prior to the *NRTA*s through a declaration by the Superintendent General of Indian Affairs. A further delegation of federal legislative authority is found in what is now known as s. 88 of the *Indian Act*[18] (formerly s. 87). This section has its roots in the 1890 *Indian Act* amendments and provides that provincial laws of general application can apply to "Indians" as long as they do not conflict with a treaty or federal statute even if they affect "Indians as Indians". The Supreme Court of Canada in the *Dick*[19] decision held that provincial hunting regulations, as laws of general application, apply of their own force to First Nations hunters off reserve but they also apply to First Nations on the basis of s.88 saving what would otherwise be an unconstitutional law as it affects "Indians as Indians".

As a result of the *NRTA* hunting clause and the *Indian Act*, the provinces have the ability to enact laws that limit the exercise of

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regulation of Indian hunting, it was Parliament who was to regulate First Nations hunting from time to time. It should be noted as well that limitations were put on this power to regulate during the treaty negotiations when the Treaty Commissioners expressly stated that they assured the "Indians" they would only regulate their traditional livelihood (1) to conserve the game animals, (2) for the benefit of the "Indians".

[18] *Indian Act*, R.S.C. 1985, c.I-5. The term "Indians" was used by Parliament to indicate who it would exercise its jurisdiction over. The term had a specific definition of who was "Indian". Since Provincial Legislatures could not legislate over "Indians", s. 88 was passed to allow laws that applied generally to everyone in a province to also apply to "Indians". "Indians as Indians" were off limits to provinces until s. 88 was passed.

[19] *R. v. Dick* [1985] 1 S.C.R. 309. For commentary on this decision see Leroy Little Bear, "Section 88 of the Indian Act and the Application of Provincial Laws to Indians" in J. Anthony Long and Menno Boldt,

Aboriginal and treaty rights to hunt, fish and trap. The rationale for these delegations of s. 91(24) federal powers date back to 1890 when *Indian Act* amendments included s. 133. This section provided that:

> **The Superintendent General [of Indian Affairs] may, from time to time, by public notice, declare that, on and after a day therein named, the laws respecting game in force in the Province of Manitoba or the North West Territories, or respecting such game as it specified in such notice, shall apply to Indians within the said Province or Territories, as the case may be, or to Indians in such partes thereof as to him seems expedient.**[20]

Game regulations were being developed at this time to address the apparent decline in various game animal stocks as reported by naturalist clubs, sportsmen and First Nations leaders.[21] Section 133 was designed to address a "bone of contention" between First Nations and White hunters -- the ability of First Nations hunters to hunt while White hunters were disallowed by provincial game laws. This section promised equal treatment of White and First Nations hunters through the application of game regulations to both groups.

Although it is often assumed that game regulations were promulgated for conservation purposes, there may have been other motivations.[22] This thesis explores one other possible motivation for how and why First Nations hunters became regulated in western Canada,

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eds., *Governments in Conflict?: Provinces and Indian Nations in Canada* (Toronto: University of Toronto Press, 1988) 175.

[20] *An Act further to amend "The Indian Act", chapter forty-three of the Revised Statutes,* (U.K.) 53 Vict., 1890, c. 29, s. 10.

[21] Game has not been consistently defined in the various game laws nor in the academic literature. I use the term game here to include birds, small and big game, hunted for food, commerce, or sport.

[22] Frank Tough argues that the regulation of First Nations hunters had an economic motive in the interests of the provinces and for sports hunters in his article, "Conservation and the Indian: Clifford Sifton's Commission of Conservation, 1910-1919", (1992) 8:1 *Native Studies Review* 61.

especially in Alberta. It explores the other purposes game regulations might have served. In particular, I want to establish that one possible factor which partly explains the imposition and enforcement of restrictive game laws on First Nations people in the Treaty 7 and Treaty 8 areas was the values of equality, paternalism and sportsmanlike conduct which enabled sports hunters to continue their pleasure sport of killing game.[23] Further, I establish that one possible explanation for the delegation of federal power to the territorial and provincial governments over First Nations hunting and the adoption of provincial regulations was the influence by a strong sport lobby and provincial aspirations for more power. The importance of the thesis is that this sport hunting influence tends to be overlooked in research on issues such as conservation and allocation of resources.

The methodology adopted to explore this question reflects a broad, interdisciplinary approach to legal history. In particular, I aim to shed light on ideas prevalent at the turn of the century regarding the enforcement of wildlife legislation and the regulation of First Nations' hunting. I will do this by looking to a number of sources including archival records, historical opinion, legal instruments, and general correspondence between the Dominion Government and the provincial bodies. However, due to limitations of time and financial resources, my review of Department of Indian Affairs correspondence was for the period

[23] Sports hunters are those persons who hunt primarily for pleasure and sport. They may consume part of

1880-1910. My focus is also around Treaties 7 and 8 since the correspondence primarily related to these areas.

The study of legal history has traditionally been restricted to what Robert W. Gordon describes as "inside the box"; that is, case law history, statutes, courts, lawyers and judges isolated from anything external.[24] My approach is "new legal history"[25] which also looks "outside the box". Thus, I look at the above sources to ascertain the historic, economic and social context within which game laws were developed, enacted, and enforced. Going "outside the box" gives one a clearer understanding of why wildlife legislation was enacted in western Canada at the turn of the century. However, in my final concluding chapter I discuss in more detail the law, cases and legal issues in the contemporary context and how historical research "outside the box" can assist in providing a better understanding of the regulatory regime around the early 1900s.

Although some academic literature has been published on First Nations peoples' rights to hunt and fish, this area of study has been overlooked from a legal historical perspective. Kent McNeil and Douglas Sanders have written on Native hunting rights from an historical perspective but take a narrow doctrinal approach by reviewing the

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the animal but are primarily interested in the act of hunting and bagging a trophy head.

[24] Robert W. Gordon, "J. Willard Hurst and the Common Law Tradition in American Legal Historiography" (1976) 10 *Law and Society Review* 9 at 11.

[25] See for example, Barry Wright, "An Introduction to Canadian Law in History" in W. Wesley Pue and Barry Wright, eds., *Canadian Perspectives on Law and Society: Issues in Legal History* (Ottawa: Carleton University Press, 1988) 7 who discusses the new legal history and see also Barry Wright, "Towards a New Canadian Legal History" (1984) 22 *Osgoode Hall Law Journal* 349.

content of cases and legislation.[26] Peter Cumming and Kevin Aalto have also written on Inuit hunting rights from a doctrinal, historical perspective.[27] Bennett McCardle in her study, *The Rules of the Game: The Development of Government Controls Over Indian Hunting and Trapping In Treaty Eight (Alberta) to 1930,* has also written an historical analysis of the development of government controls on Indian hunting and trapping but focuses on the Treaty 8 area.[28] My study will build upon McCardle's analysis and also extend into other Treaty areas including Treaty 7, where the Stoney First Nations reside.[29] I plan to go beyond the content of the legislation and cases of the time to examine the ideology or "legal culture" of wildlife managers, game guardians, and Department of Indian Affairs officials to explain the attitudes held by those applying wildlife regulations to First Nations hunters.[30] I cull correspondence among and between wildlife officials who have the

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[26] Kent McNeil, *Indian Hunting, Trapping and Fishing Rights in the Prairie Provinces of Canada* (Saskatoon: Native Law Centre, University of Saskatchewan, 1983); D.E. Sanders, "Hunting Rights – Provincial Laws – Application on Indian Reserves" (1973-74) 38 *Saskatchewan Law Review* 234; D.E. Sanders, "Indian Hunting and Fishing Rights" (1973-74) 38 *Saskatchewan Law Review* 45.

[27] Peter A. Cummings and Kevin Aalto, "Inuit Hunting Rights in the Northwest Territories" (1973-74) 38 *Saskatchewan Law Review* 251. See also short discussion on hunting rights in Peter A. Cumming and Neil H. Mickenberg, eds., *Native Rights in Canada* 2d Edition (Toronto: Indian-Eskimo Association of Canada and General Publishing Co. Limited, 1972).

[28] Bennett McCardle, *The Rules of the Game: The Development of Government Controls Over Indian Hunting and Trapping in Treaty Eight (Alberta) to 1930* (Ottawa: Indian Association of Alberta, Treaty and Aboriginal Rights Research, 1976) [unpublished]. For an excellent social and historical approach to the development of game laws in the far north, see Robert G. McCandless, *Yukon Wildlife: A Social History* (Edmonton: University of Alberta Press, 1985).

[29] As shown below, the Stoney First Nations were a primary focus of unhappy sports hunters.

[30] Louis Knafla and Susan Binnie have described "legal culture" as "a broad historical term that comprises a community's legal mind, and includes legal ideology as one aspect of legal relations: culture implies those assumptions, beliefs, and customs that lie behind and inform its normative law. It provides the theoretical framework and historical context from which the law of the community can be interpreted. See Louis Knafla and Susan Binnie, "Introduction - Beyond the State: Law and Legal Pluralism in the Making

authority to regulate game; those with authority to regulate and protect Indians; and sportsmen associations who applied political pressure.

I begin with an overview of early wildlife legislation and treaty rights to hunt. To illustrate the points raised, I focus on Treaty 7 and Treaty 8. This is followed by a broader discussion of what hunting meant to First Nations and sports hunters and its importance to both groups. The attitude of sportsmen, game protection associations and game guardians are explored by drawing on archived documents such as Alberta Fish and Game Protective Association files and the game guardian files. Finally, I discuss the debate around provincial jurisdiction, prevalent attitudes, demands for increased regulation of Indian hunting, by drawing from correspondence between the provincial game managers and the Department of Indian Affairs officials.

Through this process, I demonstrate that jurisdiction was an issue. It was not clear at the turn of the century whether provincial jurisdiction over game regulation applied to First Nations hunting off reserve on Crown lands. The legal status of treaties and the immunity of treaty hunting, fishing and trapping rights from restrictive regulation was also unclear. Consequently, provincial government officials applied pressure for increased regulation of First Nations hunters and were able to convince federal government officials that the terms of the treaties themselves supported the authority to restrict First Nations hunting

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of Modern Societies" in Louis Knafla and Susan Binnie, eds., *Law, Society and the State: Essays in*

since the hunting provisions were "subject to such regulations as may from time to time be made by the Government of the country".[31] As discussed in Chapters 3 and 4, this was important because territorial and provincial game laws were already being enacted and enforced against Whites in western Canada. As a result of the strong lobby of Fish and Game Associations, who saw First Nations hunters as competition for scarce resources, pressure was applied to bring First Nations hunters under the game laws. These sports associations convinced the federal government to amend the *Indian Act* to allow the Superintendent General of Indian Affairs to declare certain Indian bands to be subject to the territorial or provincial laws in force in the prairie provinces.[32]

A review of the historical record in Chapters 2, 3 and 4 show conflicting views of the value of game and the purpose of its regulation. While Treaty Indians valued wildlife as a gift from the Creator and harvested sufficient wildlife to sustain their traditional livelihood and survive the changing economy; sports hunters and others viewed wildlife as objects for sport and harvested big game merely for its trophy value. Most sportsmen, game protection association members and game management officials viewed First Nations hunters as carrying out wanton destruction of game. They took this negative view of First

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Modern Legal History (Toronto: University of Toronto Press, 1995) at 12.

[31] *Treaty No. 8 and Adhesions, Reports, Etc.* (Ottawa: Indian Affairs and Northern Development and Queen's Printer, 1966) at 6.

[32] This *Indian Act* amendment is discussed *supra*, note 20.

Nations hunters because they saw First Nations hunters as competition for the scarce resources.

1.1 Early Wildlife Legislation in Western Canada

Game regulations were contemplated by the Dominion government prior to the signing of the western treaties. As territorial governments began to assume jurisdiction over wildlife, they began to pressure the Dominion Government to expand the scope of their game legislation to include Indian hunters. The proviso in treaty hunting clauses provided for regulations to be made "from time to time."[33] Territorial and provincial governments in western Canada pointed to this proviso to argue that Indian rights were intended to be subject to regulations.

In 1886, with the *North West Territories Act*,[34] the Dominion government introduced the common and statute law of England into the North West Territories, the area now known as Manitoba, Saskatchewan and Alberta. These laws continued to apply to the extent that they were not altered by Dominion or local government.

The Dominion Government created wildlife legislation for the unorganized part of the North West Territories, that is, the districts

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[33] Treaty No. 7 as reprinted in Alexander Morris, , *The Treaties of Canada With the Indians of Manitoba and the North-West Territories Including the Negotiations on Which they Were Based and Other Information Relating Thereto* (Calgary: Fifth House Publishers, 1991) at 369. The Stoney understanding of the treaty right to continue their traditional livelihood will be discussed below in Chapter 4.

[34] *North West Territories Act*, S.C. 1886, c. 60, s.11 as am. by 60-61 Vict., c. 28.

without local (Canadian) government. On July 23, 1894, Parliament gave Royal Assent to *An Act for the Preservation of Game in the Unorganized Portions of the North West Territories of Canada* (North West "*Game Act*").[35] This new *Game Act* became law on January 1, 1896 and placed restrictions on hunting. One section, section 4, seriously affected First Nations people of northwest Canada. Section 4 stated, "except as hereinafter provided, buffalo and bison shall not be hunted, taken, killed, shot at, wounded, injured, or molested in any way, at any time of the year until the first day of January, A.D. 1900".[36] This had a significant impact on First Nations because the provisions concerning buffalo were the only regulations strictly enforced against White and First Nations hunters.[37] The *Game Act* went through various amendments until 1905 when the provinces of Alberta and Saskatchewan were established and Parliament enacted *An Act for the Preservation of Game in the Northwest Territories*[38] which recognized the jurisdiction of the two new provinces to legislate wildlife.

Local legislatures in the North West Territories and Manitoba established their own game laws which applied to White hunters only. As early as 1877 the Territorial Council passed a game Ordinance

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[35] S.C. 1894, 57-58 Vict., c.31.
[36] *Ibid.*
[37] Rene Fumoleau, *As Long As This Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939* (Toronto: McClelland and Stewart, 1973) at 53.
[38] R.S.C., 1906, c. 151.

respecting the protection of buffalo.[39] Cumming and Aalto argue that the main object of the ordinance was "to protect their [Indians] major food supply."[40] The enforcement of this game regulation was vigorously opposed by the First Nations and it was repealed the following year. It was not until 1883 that the Territorial Counsel passed another game ordinance which set out times for legal hunting and types of animals which were restricted.[41] This regulation continued the policy of preserving for First Nations their traditional sources of food. However, in 1889, the Territorial Council passed an amendment which repealed the exemption for First Nations.[42] The response of the Dominion Government was to disallow it on the basis, *inter alia*, that it would conflict with the treaty hunting provisions.[43] The protection of First Nations access to hunting game for food would ultimately be entrenched in the proviso part of s. 12 of the *NRTA, 1930.*

The North West Territories legislature passed *The Game Ordinance*[44] in 1890 which provided for closed seasons on some game. In 1905, Alberta passed its first *Game Act* entitled *An Act to Amend Chapter 29 of the Ordinance of the Northwest Territories 1903 (Second Session), Intitled "An Ordinance for the Protection of Game"*[45] which amended the

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[39] *An Ordinance for the Protection of Buffalo*, North West Territories Ordinances, 1877, No. 5.
[40] Cumming and Aalto, *supra*, note 27.
[41] *An Ordinance for the Protection of Game*, North West Territories Ordinances, 1883, No. 8.
[42] *An Ordinance to Amend Chapter 25 of the Revised Ordinances of the Nort West Territories, intituled "The Game Ordinance"*, North West Territories Ordinances, 1889, No. 11.
[43] S.C. 1891.
[44] O.C. 1890.
[45] S.A. 1906, c. 29.

territorial game ordinance previously in place. The following year, the Alberta government passed its own *An Act for the Protection of Game* (*"Alberta Game Act"*).[46]

As discussed earlier, the *Indian Act*, 1890 enabled the Superintendent General of Indian Affairs to declare which First Nations would be subject to the territorial or provincial game laws. It was silent on the potential impact of these laws on rights protected by treaty. Further, although it was generally understood that the provinces had jurisdiction over wildlife or game within their borders, it was unclear whether their jurisdiction extended to First Nations hunting on unoccupied Crown lands. For example, in 1915, a forestry faculty member of the University of Toronto states, "there is a difference in governmental control, the Pacific slope being entirely under the Provincial Government of British Columbia and the Alberta slope partly under the Dominion and partly under the Alberta government".[47] He refers to the national parks jurisdiction in Alberta being under the federal government while the rest of the province is under provincial powers.

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[46] S.A. 1907, c. 14.

[47] W.N. Millar, "The Big Game of the Canadian Rockies: A Practical Method for its Preservation" in Commission of Conservation, Committee on Fisheries, Game and Fur-Bearing Animals, *Conservation of Fish, Birds and Game - Proceedings at a Meeting of the Committee, November 1 and 2, 1915* (Toronto: The Methodist Book and Publishing House, 1916) 100 at 100.

By 1921 the dominant opinion among legislators was that provinces had jurisdiction over wildlife. This opinion is illustrated by Dominion entomologist, C. Gordon Hewitt, who writes:

> **Owing to the fact that the protection of game and wild life in the various provinces has been undertaken by the respective provincial governments, the Dominion Government, with certain exceptions ..., has confined its jurisdiction to the protection of game and fur-bearing animals and other wild life in the Northwest Territories and the Yukon Territory.[48]**

The nature of this jurisdiction and the influences resulting in delegation to the provinces is elaborated upon in Chapter 4 below.

Hewitt also discussed the need for amendment to the game legislation. The most important amendment dealt with regulating the fur trade because there had been unrestricted and "excessive destruction" of the animals "especially by certain types of foreign trappers" who were using poison and were cleaning out whole areas.[49] Hewitt also noted that First Nations in the far North often sold the products of the hunt and he expressed concern about the detrimental effects of the commercialization of game products. He stated:

> **The killing of game by Indians in the Yukon, particularly moose, for the purposes of sale to traders, is a practice that should be suppressed immediately. It is unwarranted; it incites a class of men, all too eager to kill everything in sight, to kill to the limit; and its continuance will absolutely deplete the supply of moose and other game animals.[50]**

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[48] C. Gordon Hewitt, *The Conservation of the Wild Life of Canada* (New York: Charles Scribner's Sons, 1921) at 258.
[49] *Ibid.* at 260.
[50] *Ibid.* at 263.

The issue of provincial jurisdiction over First Nations hunting on Crown land off reserve was made more complicated by the status of treaties.

Conflict arose between provincial game laws and First Nations' treaty rights to hunt. During treaty negotiations First Nations were promised they could continue their traditional livelihoods and would be provided reserves should they chose to settle.[51] In fact, documentation of treaty negotiations and oral histories make it clear that the Chiefs and Headmen were adamant about assurances that they could continue their usual vocations of hunting, fishing and trapping.[52] The text of Treaties 6, 7 and 8 provide that their livelihood rights were subject to regulation but the First Nation's understanding was that they could continue their livelihood without fear of restrictions.[53]

The increasing scope of game laws interfered with First Nations' access to wildlife as they were being enacted by territorial and provincial governments or declared applicable by the Dominion Government. For example, game laws allowed hunting only during limited seasons, required licenses, and restricted what animals could be taken. Consequently, First Nations hunters were charged with offences while exercising their treaty rights to hunt and trap. This resulted in First

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[51] See eg., Alexander Morris, *supra*, note 33 at 184, 186, 193 and 259. See also treaty 8 hunting clause *supra*, note 31.

[52] See eg., Richard Price, ed., *The Spirit of the Alberta Indian Treaties* 3d ed. (Edmonton: University of Alberta Press, 1999).

[53] Isadore Willier who was over one hundred years old in 1972 stated the First Nations were told that "no one will ever stop you from obtaining these animals anywhere ... you will always making your living that way" as quoted in Richard Daniel, "The Spirit and Terms of Treaty Eight" in Price, *ibid.*

Nations' traditional livelihoods being criminalized.[54] However, at the outset, game laws were applied to First Nations rather loosely in Northern Alberta.[55] The Alberta government was willing to relax its application of game laws because they did not want to recognize special rights for the First Nations peoples since they thought it politically risky. The only concession the province would make to recognize the unique circumstances of First Nations hunters was to relax the enforcement of the regulations against First Nations persons hunting in the most northerly parts of the province who hunted for food and where competition was less severe. However, as in the south, eventually settlement and agricultural and other development tended to further restrict First Nations ability to carry on their traditional livelihoods.

1.2 First Nations' Access to Wildlife: Negotiating a Livelihood

The First Nations' perspective on hunting and federal acknowledgement of the significance of rights of First Nations is illustrated in the text and negotiations leading to treaty. Across the prairies, treaties were entered into between the First Nations and representatives of the federal Crown. Traditional livelihood was of grave concern to the Chiefs and Headmen negotiating on behalf of the First

[54] Tough, "Game Protection and the Criminalization of Indian Hunting" *supra*, note 11.
[55] McCardle, *supra*, note 28; see also Richard Price and Shirleen Smith, "Treaty 8 and Traditional Livelihoods: Historical and Contemporary Perspectives" (1993-1994) 9:1 *Native Studies Review* 51.

Nations in the prairie treaties. Virtually all of the treaties expressly provide for the right of First Nations to hunt and fish.[56] For example, Treaty 7 provides:

> And Her Majesty the Queen hereby agrees with her said Indians, that they shall have the right to pursue their vocation of hunting throughout the tract surrendered as heretobefore described, subject to such regulations as may, from time to time, be made by the Government of the country, acting under the authority of Her Majesty; and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, trading or other purposes by her said Government of Canada, or by any of her Majesty's subjects duly authorized therefor by the said Government;[57]

Treaty 8 has a similar clause but it expressly protects "hunting, trapping and fishing", rather than just hunting.[58]

The Treaty Commissioners' reports provide strong extrinsic evidence of the Indian understanding of the rights promised. According to Canadian law, the negotiations form part of the treaty.[59] This is important because it demonstrates how treaty signatories were particularly concerned about the effect of restricting game laws. For example, the Treaty 8 Commissioners' Report states:

> Our Chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were so

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[56] Treaties 3, 4, 5, 6, 7, 8, 9, 10 and 11 all have express wording providing for the continuation of First Nations livelihoods. See generally, Tough, "Treaty Rights to a Livelihood" (report, Public Interest Law Centre, Winnipeg, 9 March, 1998) [unpublished] and Jean Friesen, "Magnificent Gifts: The Treaties of Canada With the Indians of the Northwest 1869-76" in Price *supra*, note 52 at 203.

[57] Treaty No. 7 as reprinted in Morris, *supra*, note 33, at 369. The Stoney First Nations understanding of the treaty right to continue their traditional livelihood will be discussed below in Chapter 4.

[58] *Supra* note 31.

[59] *R. v. Badger* [1996] 2 C.N.L.R. 77. See Leonard I. Rotman "Taking Aim at the Canons of Treaty Interpretation in Canadian Aboriginal Rights Jurisprudence " (1997) 46 *UNBLJ* 11.

> restricted as to render it impossible to make a livelihood by such pursuits.[60]

The Treaty 8 Commissioners took pains to convince the Chiefs and Headmen during the negotiations that any game laws would only be made for conserving the game for their benefit:

> But over and above the provision, we had to solemnly assure them that only such laws as to hunting as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made ...[61]

The Commissioners also provided more assurance by solemnly promising the First Nations that they would remain "as free to hunt and fish after the treaty as they would be if they never entered into it."[62] More than twenty years after the last treaty was signed in Alberta, in 1921 government officials were still aware that the livelihood and subsistence of First Nations relied heavily opon the hunting and trading of wildlife resources. Indeed, Gordon Hewitt stated:

> The fur trade of the north is not only the Chief occupation of that immense area, but it is the only means of livelihood and existence of the population. Unless the fur trade is maintained an enormous section of the Dominion would be rendered unproductive, and the native inhabitants would either starve to death or become a charge on the government.[63]

The Indian understanding of these treaties and federal recognition of the importance of the hunt is discussed in greater detail in Chapters 2 and 4 below.

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[60] *Treaty No. 8, supra,* note 31 at 6.
[61] *Ibid.*
[62] *Ibid.*
[63] C. Gordon Hewitt, *The Conservation of the Wild Life, supra* note 48 at 258-259.

Hewitt and the Treaty Commissioners displayed a better understanding of the unique position of First Nations when compared to federal and provincial politicians pressured by much of Canadian society with respect to hunting of wildlife. Chapter two expands on this point by exploring the importance of hunting and conservation to First Nations and sport hunters whose values were dominant in the prairie provinces from 1880 to 1930.

Chapter 2

Pre-Natural Resources Transfer Agreement Environment

2.1 The Importance of First Nations Hunting

Hunting was, and still is, of prime importance to First Nations people. Firstly, it is an important food source. Although a First Nations person's diet consisted of berries and other plants, an important staple came from a variety of birds, fish, and small and big game animals.[1] Secondly, parts of the animal were used for clothing, shelter and many other important uses. For example, animal bones became knives, handles, hammers, needles; sinew provided thread or rope; bladders became vessels to hold liquids; and hides and fur were used for coats, shirts, leggings and moccasins. Hides were also used as a teepee covering.[2] Thirdly, hunting had great cultural significance. It was a way of life that reflected a close spiritual relationship with the land and

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[1] Arthur J. Ray, ""Commentary on the Economic History of the Treaty 8 Area" (1995) 10:2 *Native Studies Review* 169 at 173; Edward J. Hedican, *Applied Anthropology in Canada: Understanding Aboriginal Issues* (Toronto: University of Toronto Press, 1995) at 115 states "The Native peoples of Canada have hunted, fished, and collected wild foods from time immemorial, and country food production continues to constitute a significant proportion of the food they consume today".; see also generally, E.E. Wein, J.H. Sabry and F.T. Evers, "Food Health Beliefs and Preferences of Northern Native Canadians" (1989) 23 *Ecology of Food and Nutrition* 177 and Peter A. Cumming and Neil H. Mickenberg, eds., *Native Rights in Canada* 2d Edition (Toronto: Indian-Eskimo Association of Canada and General Publishing Co. Limited, 1972) at 207.

[2] Irene Spry, "The Great Transformation: The Disappearance of the Commons in Western Canada" in Richard Allen, ed., *Man and Nature on the Prairies* (Regina: Canadian Plains Research Centre, 1976) 21 at 24 gives a listing of the many uses of the buffalo.

animals.[3] Consider, for example, the Algonquin First Nations, from which the Western Cree are derived. They believe that the Great Spirit is the "Creator and sustainer of all things" and everything has a spirit.[4] The key to understanding the "Indian's role within Nature lies within the notion of mutual obligation" where the "other life forms, such as animals, fish, birds and plants, were to yield themselves up to the Indian for his needs" in return for adhering to strict hunting and fishing rituals "as a way of bestowing cautious respect to a conscious fellow-member of the same eco-system who literally allowed itself to be killed for food or clothing."[5] Many First Nations believe respect for Nature and her animals ensures the success of future hunts. Concern for future hunts likely had a regulating effect on hunting practices that might lead to the exploitation of game.

Many First Nations peoples also believe their origins are in this North American land mass. Such legends and myths "emphasize and confirm the people's fundamental attachment to the land" with many

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[3] Kent McNeil, , *Indian Hunting, Trapping and Fishing Rights in the Prairie Provinces of Canada* (Saskatoon: Native Law Centre, University of Saskatchewan, 1983) note 26, at 1 states "Hunting, fishing and gathering were integral parts of their daily lives, and affected every aspect of their culture, including their religion"., and later at 1 states "these rights [to hunt, fish and gather] remain not only an economic necessity for many Indians but also a link with their cultural heritage and a symbol of their unique position in Canadian society". See also Gail Helgason, *The First Albertans: An Archeological Search* (Edmonton: Lone Pine Publishing, 1987) at 153-155; and Allan Herscovici, *Second Nature: The Animal-Rights Controversy* (Toronto: CBC Enterprises/Les Enterprises Radio-Canada, 1985), especially Chapter Four "The World of the Cree Hunter".

[4] Shelley D. Turner, "The Native American's Right to Hunt and Fish: An Overview of the Aboriginal Spiritual and Mystical Belief System, The Effect of European Contact and the Continuing Fight to Observe a Way of Life" (1989) 19 *New Mexico Law Review* 377 at 380-382.

[5] Such beliefs are very similar to Western Cree who Tony Fisher clearly argues are merely different from the Eastern Cree in ecological adaptation and are Cree who migrated west between the mid 1600s to the early 1700s by which time they were established as far as the Rocky Mountains. Anthony D. Fisher, "The

stories and songs relating to Nature or her animals.[6] This is also evident in negotiations leading to Treaties 7 and 8. With respect to Treaty 7, the Stoney First Nations view their attachment to the land as "sacred."[7] Hunting had a strong cultural and spiritual value to First Nations, including signatories to Treaties 6, 7 and 8 who prior to and following the treaty maintained a spiritual connection with the game they hunted.

Hunting was also important for commerce. In Treaty 8 and other treaty areas, it provided products for trade and barter with other groups.[8] Furs, hides, moccasins, fresh meat, dried meat, pemmican, fish, plants and roots and other products were traded with other First Nation groups.[9] After contact, barter and trade for goods increased. Surplus meat, fish, birds and other foods could be traded or sold to the traders, explorers, missionaries or any settlers.[10]

Cree of Canada: Some Ecological and Evolutionary Considerations" in Bruce Cox, *Cultural Ecology: Readings on the Canadian Indians and Eskimos* (Toronto: McClelland and Stewart, 1973) 126 at 134.

[6] Olive Patricia Dickason, *Canada's First Nations: A History of Founding Peoples From the Earliest Times* (Don Mills, Ontario: Oxford University Press, 1997) at 3.

[7] See eg. Chief John Snow, *These Mountains are Our Sacred Places: Story of the Stoney Indians* (Toronto: Samuel Stevens, 1977) at 11 he states "Therefore the Rocky Mountains are precious and sacred to us. We knew every trail and mountain pass in the area. We had special ceremonial and religious areas in the mountains. ... They are a place of hope, a place of vision, a place of refuge, a very special place where the Great Spirit speaks with us".

[8] For Treaty 8 see eg. Ray, "Economic History of the Treaty 8 Area", *supra*, note 1 , and *R. v. Horseman* (1990) 55 C.C.C. (3d) 353. For Treaty 7 see Glenbow Archives, File No. M1175, Henry Stelfox, typed article entitled "Peter Pangman" where he states Pangman had learned from the Stoney Indians that the Stoney First Nations used to trade with the Kootenai [sic], Salish and Shuswap First Nations various products of the hunt.

[9] *Ibid.*

[10] Ray, "Economic History of the Treaty 8 Area", *supra*, note 1. See also generally, Arthur J. Ray, *Indians in the Fur Trade: Their Role as Hunters, Trappers and Middlemen in the Lands Southwest of Hudson Bay, 1660-1870* (Toronto: University of Toronto Press, 1974).

2.1.1 The Overhunting Debate

Some academics suggest that First Nations might have been involved in hunting practices that resulted in the extermination or near extermination of certain animals. This is why provinces wished to subject them to game laws. For example, historian Calvin Martin argued that First Nations hunters abandoned their traditional beliefs and practices and over-trapped because they perceived a break in the sacred pact between hunters and animals. They believed that the animals had given them diseases -- diseases brought to Canada by European newcomers.[11] Others refute Martin's claims by exposing methodological flaws in his research. For example, critic Charles Bishop argued that Martin's study is erroneous and that First Nation's traditional beliefs did not disappear, since adherence to their traditional hunting beliefs was recorded well after Martin' focus period.[12]

Others suggested that First Nations might have taken part in the overexploitation of game for economic and political reasons.[13] The First

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[11] Calvin Martin, *Keepers of the Game: Indian-Animal Relationships and the Fur Trade* (Berkeley: University of California Press, 1978).

[12] Charles A. Bishop, "Northeastern Indian Concepts of Conservation and the Fur Trade: A Critique of Calvin Martin's Thesis" in Shepard Krech III, ed., *Indians, Animals, and the Fur Trade: A Critique of Keepers of the Game* (Athens: University of Georgia Press, 1981) at 39. This book edited by Krech is a collection of authors who critique Martin's work and also contains a review article by Martin as well as a Comment by Martin.

[13] Charles M. Hudson, "Why the Southeastern Indians Slaughtered Deer" in Shepard Krech III, ed., *Indians, Animals, and the Fur Trade: A Critique of Keepers of the Game* (Athens: University of Georgia Press, 1981) at 155.

Nations in Hudson's study reportedly required more guns to avoid enslavement by other First Nations. They might have sold quantities of deer hides to obtain guns. A similar situation occurred in western Canada as First Nations continued their subsistence livelihood and also accumulated surplus furs for trade in European goods on which they became increasingly dependent.[14] The most powerful First Nations in the fur trade obtained guns from European traders and in turn allowed traders to encroach into other First Nations' territories to hunt and trap. Andrew Graham, a fur trader writing in the 1760s, explains "in order to search for furs to barter, or because food grew scarce by the large numbers of animals destroyed for their furs and skins ...[the Cree] gradually [had] to retire farther inland, until they came amongst the buffalo".[15] Thus, with their positioning in the fur trade, the Cree were able to successfully encroach into the prairies.

There is also a possibility that individual First Nations hunters felt the need to increase their take of game to get it before the competition. However, not all First Nations participated in overexploitation of game nor would all members of a particular First Nation take part. To the extent overexploitation of animals occurred by First Nations, it was not the only cause of decline in game numbers since settlement and agricultural development of the land accounted for a substantial decline

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[14] Ray, *Indians in the Fur Trade*, *supra*, note 10, at 147 stated that for the forest Indian groups, Woodland Assiniboine, Ojibway and Cree, "participation in the fur trade led to growing dependence on the trading companies."

in the habitat for animals. First Nations were aware of declining stocks of game over time.[16] They even asked for game protection laws as the buffalo disappeared. Indeed, at the treaty payment at Qu'Appelle, Saskatchewan in 1876, "not only every Chief, but each Headman, separately begged the Government to do something to prevent the entire extermination of the buffalo".[17] However, as discussed later regarding Treaty 8 First Nations, they often wanted game laws to restrict White hunters from hunting in their territories but not necessarily to restrict their own hunting rights.[18]

The First Nations of the area that became northern Alberta, and the area covered by Treaty 8, exploited game and fish for food and commerce. They became involved in the fur trade as early as 1717 when Athapaskan First Nations were travelling to Fort Churchill.[19] As the Cree pushed west, they played a more powerful role as middlemen. The two major fur-trading rivalries were in growing competition for First Nations' furs. It is reported that First Nations exploited this competition to secure the best prices for their furs, but by 1821 the fur resources had been seriously depleted.[20] Arthur Ray argued that the Hudson's Bay Company

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[15] Quoted in Hugh A. Dempsey, *Indian Tribes of Alberta* (Calgary: Glenbow Museum, 1988) at 52.
[16] John Leonard Taylor, "Two Meanings of Treaties Six and Seven" in Richard Price, ed., *The Spirit of Alberta Indian Treaties* 3d ed. (Edmonton: University of Alberta Press, 1999) discusses the several times during treaty negotiations that Chiefs brought up the point of the declining numbers of game.
[17] George F.G. Stanley, *The Birth of Western Canada: A History of the Riel Rebellions* (Toronto: University of Toronto Press, 1961) at 222.
[18] Richard Daniel, "Hunting, Fishing and Trapping Rights: White Competition and the Concept of Exclusive Rights for Indians" (Edmonton: Treaty and Aboriginal Rights Research, Indian Association of Alberta, 1976) [unpublished].
[19] Arthur J. Ray, *Indians in the Fur Trade, supra*, note 10, at 59.
[20] *Ibid.*

was able to induce First Nations "to practice conservation and to reduce the level of fur harvest that had threatened the resource base and the fur trade".[21] If this argument is correct, then one can infer that the officials of the Hudson's Bay Company were concerned with conservation of the game resources insofar as depletion threatened their economy. In other words, the fur game were not valued by the Hudson's Bay officials for their intrinsic worth or their aesthetic value, but only as a valued economic resource.

Throughout the Hudson's Bay Company's monopoly, and prior to Treaty 8, First Nations in northern Alberta benefited from increased material wealth of European goods and were still able to maintain access to the natural resources. Thus, as Daniel argued:

> although they became increasingly dependent upon trade goods and the services of the trading companies, they never lost the option of returning, to a greater of lesser degree, to a life based on hunting, fishing, and trapping for subsistence rather than trade. In fact, for most of them, continued reliance on traditional pursuits was a necessary supplement to the fur trade economy.[22]

Different First Nations cultures within this area exploited fur animals in different ways. For example, the Dene were more sedentary than the Cree who relied upon a system "of intensively hunting and trapping an area until depleted, then moving to a new area and allowing the former area to regenerate."[23] Each system had its own mechanisms

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[21] *Ibid.* at 201-203.
[22] Richard Daniel, "The Spirit and Terms of Treaty Eight" in Richard T. Price, ed., *The Spirit of the Alberta Indian Treaties*, Third Editon (Edmonton: University of Alberta Press, 1999) 47 at 52.
[23] *Ibid.* at 54.

to allow for regeneration and replenishment of stocks. The Dene would not exploit the game to depletion, but would rather harvest more selectively.[24] Nevertheless, each culture had their own methods and ceremonies relating to animals and their hunt.

Richard Daniel argued that these experiences of the First Nations would have coloured their perception of the negotiations for treaties during the 1800s.[25] They depended on wildlife for their subsistence and through the fur trade developed a relationship with the Europeans that saw them continue their traditional pursuits and develop a commercial economy whereby any surplus could be traded or bartered for useful goods. They would have anticipated "rights to control, buy, and sell animals" and would have "sought to protect their way of life and their access to natural resources" at the time of treaty through demands at the treaty negotiations "expressed primarily as a demand for control of wildlife resources rather than in terms of land rights under Canadian law".[26] Indeed, at the treaty negotiations in western Canada, and particularly Alberta, the First Nations' Chiefs and Headmen made stringent demands for the continuance and protection of their traditional livelihoods. The historical record clearly shows that during treaty negotiations First Nations leaders argued strenuously for the protection of their livelihood. For example, James K. Cornwall, an early

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[24] *Ibid.*
[25] *Ibid.* at 55.
[26] *Ibid.*

entrepreneur who was at the Treaty 8 negotiations, signed an Affidavit declaring:

> 1.) I was present when Treaty 8 was made at Lesser Slave Lake and Peace River Crossing.
> 2.) The treaty, as presented by the Commissioners to the Indians for their approval and signatures, was apparently prepared elsewhere, as it did not contain many things that they [Indians] held to be of vital importance to their future existence as hunters and trappers and fishermen, free from the competition of white man.
> ...
> 5.) The Commissioners finally decided, after going into the whole matter, that what the Indians suggested was only fair and right but that they had no authority to write it into the Treaty. They felt sure the Government on behalf of the Crown and the Great White Mother would include their request and they made the following promises to the Indians:
> a) *Nothing would be allowed to interfere with their way of making a living, as they were accustomed to and as their forefathers had done.*
> b) The old and destitute would always be taken care of, their future existence would be carefully studied and provided for, and every effort would be made to improve their living conditions.
> c) *They were guaranteed protection in their way of living as hunters and trappers, from white competition; they would not be prevented from hunting and fishing as they had always done, so as to enable them to earn their living and maintain their existence.*[27]

The negotiations and the terms of the treaty make it clear that the true spirit and intent of entering the treaty involved the full protection of the First Nations' traditional livelihoods.[28]

Treaty Commissioners also clearly expressed that they "had to solemnly assure them [Indians] that only such laws as to hunting as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made".[29] It is within this context the regulatory power in treaties is to be understood. The

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[27] James K. Cornwall, "Affidavit", copy retained at the Roman Catholic Mission Archives at Fort Smith, file Indiens-Traite avec eux, as quoted in Rene Fumoleau, , *As Long As This Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939* (Toronto: McClelland and Stewart, 1973) at 74-75.
[28] The Supreme Court of Canada supports this conclusion in *R. v. Horseman*, [1990] 3 C.N.L.R. 95 at 101.

First Nations anticipated possible federal regulation that would conserve wildlife and protect their lifestyle at the time of treaty, not regulation by governments who were not party to the treaty and who aimed at restricting and extinguishing their rights. Furthermore, one should with confidence, "assume that Parliament intended to live up to its treaty obligations."[30] Protection and continuance of the traditional livelihood was similarly understood in other treaty areas. For example, Walter Hildebrandt et al., after a detailed review of historical and oral histories around the Treaty 7 negotiations, state that "[m]ost prominent and repeated were promises of money, unrestricted hunting, education, and medical assistance"[31] and that "The freedom to hunt was reiterated by Lazarus Wesley, who remembered that there were to be no regulations on hunting and fishing."[32] In contrast to First Nations view of wildlife, sports hunters had their own views and values respecting wildlife.

2.2 Sports Hunting Values

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[29] *Treaty No. 8 and Adhesions, Reports, Etc.* (Ottawa: Indian Affairs and Northern Development and Queen's Printer, 1966) at 6.
[30] Per Madame Justice Wilson in *R. v. Horseman, supra*, note 28 at 109.
[31] Treaty 7 Elders and Tribal Council with Walter Hildebrandt, Sarah Carter, and Dorothy First Rider, *The True Spirit and Intent of Treaty 7* (Kingston & Montreal: McGill-Queen's University Press, 1996) at 120.
[32] *Ibid.* at 122

Like the Metis and First Nations, many early white settlers relied on hunting for food.[33] However, in contrast to First Nations hunters, many European explorers, adventurers, travelers and settlers hunted as a recreational sport even when they relied on game taken to supplement provisions of an agrarian lifestyle.

Don Wetherell and Irene Kmet state that in the early years of Alberta, "hunting was as much an economic as a leisure activity".[34] For example, in 1909, the Royal Northwest Mounted Police at Wetaskiwin reported that P. Burns and Company purchased wild ducks for processing.[35] However, notwithstanding the fact that people hunted for food, hunting still "had a strong recreational element derived from a long European tradition".[36] For this reason, it is important to consider the hunting values and laws prevalent in England to understand the value placed on sport hunting in early Canada.

In England, prior to the nineteenth century, legal hunting was generally only open to the gentry and nobility. Commoners had to hunt illegally and the 'problem' of poachers arose.[37] By the 1700s, hunting in England had become the sport of the elite. They utilized their positions

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[33] Donald G. Wetherell and Irene Kmet, *Useful Pleasures: The Shaping of Leisure in Alberta, 1896-1945* (Regina: Alberta Culture and Multiculturism/Canadian Plains Research Centre, University of Regina, 1990) at 165.
[34] *Ibid.*
[35] *Ibid.*
[36] *Ibid.*
[37] For a discussion of Victorian England's poacher problems, see D.J.V. Jones, "The Poacher: A Study in Victorian Crime and Protest" (1979) 22:4 *The Historical Journal* 825 and Alun Howkins, "Economic Crime and Class Law: Poaching and the Game Laws, 1840-1880" in Sandra B. Burman and Barbara E. Harrel-Bond, eds., *The Imposition of Law* (New York: Academic Press, 1979) 273..

of power and status to exclude the peasants from hunting game. On public lands, game became property, the title of which was in the King's name. Legislation was drafted to punish peasants who 'poached' the King's game.[38] Only nobles and the gentry classes obtained the right to hunt for sport on public land. Consequently, when commoners immigrated to North America, they felt that one of the new individual freedoms they acquired, which they did not have in England, was the right to hunt. Wetherall and Kmet argued that while hunting in England "was directly linked to upper-class ownership of land", in North America anyone could hunt on the public lands.[39] Thus, many settlers in North America felt that with all the common resources in such abundance, that they had the individual freedom to hunt game as they saw fit.

Hunting in the British Empire was considered a manly pursuit and indeed hunting throughout the empire's colonies became linked with empire building.[40] Hugh Gunn argued that "the early training and instincts of the hunter have much more to do with the expansion of the Empire than is generally realized."[41] Hunting was always a sport for the elite empire builders. Moyles and Owram explained the connection as follows:

> As they explored, and conquered, and extended the Empire, the British hunted. They rode, in a state of imperialistic fervor, all over Victoria's vast dominion,

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[38] E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (London: Harmondsworth, 1977).
[39] *Supra*, note 33, at 165.
[40] John M. MacKenzie, *The Empire of Nature: Hunting, Conservation and British Imperialism* (Manchester: Manchester University Press, 1988) at 7.
[41] Hugh Gunn, "The Sportsman as an Empire Builder" in John Ross and Hugh Gunn, eds., *The Book of the Red Deer and Empire Big Game* (London: 1925) at 137-138.

> sticking pigs in India, stalking zebra along the African veldt, and charging after buffalo across the Canadian prairie. ... For many of them, unrestricted hunting was the expected rest and recreation of empire-builders - 'we have done our duty, now we must play'. [42]

Elsewhere, Moyles and Owram argued:

> Thus, whether it was a red-coated huntsman pursuing the fox, a red-coated policeman quelling hundreds of Indians by a show of unflinching courage, or the Marquis of Lorne testing his skill in a massive herd of stampeding buffalo, the method and the message was pretty much the same.[43]

John MacKenzie also argued that the significance of hunting for British imperialism in the nineteenth and twentieth centuries should not be underestimated. In his words "the colonial frontier was also a hunting frontier and the animal resource contributed to the expansionist urge. ... European world supremacy coincided with the peak of the hunting and shooting craze."[44] Descriptions of the "imperial chase" abound in the accounts of wealthy travelers, administrators, soldiers and professional hunters who "produced a seemingly endless stream of specialized hunting books, many of them dressed up as natural history".[45]

In western Canada, as railways and roadways extended further into the wilderness, there became greater access for a larger number of immigrant European hunters. This necessarily resulted in encroachment on traditional hunting territories of First Nations and Metis hunters.

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[42] R.G. Moyles and Doug Owram, "'Hunter's Paradise': Imperial-Minded Sportsmen in Canada" in R.G. Moyles and Doug Owram, *Imperial Dreams and Colonial Realities: British Views of Canada, 1880-1914* (Toronto: University of Toronto Press, 1988) at 61.
[43] *Ibid.* at 63.
[44] John M. MacKenzie, *supra*, note 40 at 7.
[45] *Ibid.*

Distances traveled to hunt grew as settlement grew. For example, in 1912, hunters from Camrose had to travel "a hundred miles or so" north to hunt for big game which were pushed out of areas by settlement.[46] Also, settlement was pushing out upland game birds and by 1903, hunters in the Calgary area had to travel north to hunt prairie chickens.[47] Still, sports hunters were willing to travel great distances over a number of days to carry out their hunt. Some elite hunters spent great amounts of money to bag their game. For example, in 1922, an American hunter purportedly spent thirty thousand dollars to kill a mountain sheep.[48]

The commoditization of wildlife in North America led to overexploitation and played a significant part in the destruction of many species. For example, buffalo were taken for their meat and buffalo robes and later for their hides that were used for industrial belts.[49] Another example is the birds taken for their plumage.[50] Both the buffalo and many birds faced extinction by the end of the 19th century. For example, in the Treaty 7 area, as the buffalo and antelope populations seriously declined, some First Nations persons occasionally killed the cattle of local

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[46] Camrose Board of Trade, *Where Farming Pays* (Camrose: Camrose Board of Trade, n.d.) ca. 1912, as quoted in Wetherell and Kmet, *supra*, note 33, at 166.
[47] *Ibid.*
[48] *Ibid.*
[49] William A. Dobak, "Killing the Canadian Buffalo, 1821-1881" (1996) 27 *Western Historical Quarterly* 33. See also Frank Gilbert Roe, *The North American Buffalo: A Critical Study* (Toronto: University of Toronto Press, 1951).
[50] Janet Foster, *Working for Wildlife: The Beginning of Preservation in Canada* (Toronto: University of Toronto Press, 1978) at 122. For a study on the trade in bird feathers see Robin W. Doughty, *Feather Fashion and Bird Preservation: A Study in Nature Protection* (Berkeley: University of California Press, 1975).

ranchers to stave off starvation.[51] As game numbers became alarmingly low, there was some movement by the settler population to implement game laws which generally restricted hunting through closed seasons and formalized sporting rules of "fair play".

Although some settlers hunted for food and commerce, Wetherell and Kmet argued that hunting and fishing was also generally viewed as a sport by European settlers in western Canada. Among settlers there was a "formalization of activity through rules, organizations, and concepts about appropriate behaviour, such as fair play."[52] British gentlemen hunters had established a code of conduct for their sport of hunting. In western Canada, this "same gentlemanly code of conduct prevailed; a code of conduct similar in many ways to that followed by the soldier and the imperial guardian, all of whom were likely to be the same person."[53] The fox hunt displayed this code of conduct clearly "where a primal instinct had been transformed into an elaborate social ritual complete with rules of etiquette and dress."[54] True sportsmen did not hunt for the "mere purpose of killing", but rather "for the pleasure derived from the invigorating exercise, the enjoyment of nature, the possibility of adding

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[51] See eg. John Jennings, "Policemen and Poachers – Indian Relations on the Ranching Frontier" in A.W. Rasporich and Henry Klassen, eds., *Frontier Calgary: Town, City, and Region 1875-1914* (Calgary: University of Calgary and McClelland and Stewart West, 1975) at 87. See also Vic Satzewich, "'Where's the Beef?': Cattle Killing, Rations Policy and First Nations 'Criminality' in Southern Alberta, 1892-1895" (1996) 9:2 *Journal of Historical Sociology* 188.

[52] Donald G. Wetherell and Irene Kmet, *supra*, note 33 at 165.

[53] Moyles and Owram, *supra*, note 42, at 63.

[54] *Ibid.* at 62; for a discussion of the importation of fox hunting into Canada, see Frank Proctor, *Fox Hunting in Canada and Some Men Who Made It* (Toronto: MacMillan Company of Canada, 1921); for a discussion of fox hunting in England see Charles Chenevix Trench, "Nineteenth-Century Hunting" (1973) 23:8 *History Today* 572.

knowledge of natural history, new regions and strange people, and the test of courage and skill demanded by the task."[55] As an example of how this code of 'fair play' became formalized in law, we review *An Act for the Preservation of Game*[56] (*"Alberta Game Act"*)of 1907. Section 8 of the Act provided for no hunting at night and no hunting on Sabbath day.[57] This was characterized as unsportsmanlike and thus was prohibited.[58] Various unsporting methods of taking animals were also prohibited in section 9: use of poison, opium or other narcotic and various traps, nets, snares and automatic shot guns.[59] Furthermore, arguably the prohibition in section 16 against trafficking in game without a license was unsporting since sports hunters increasingly frowned upon hunting for commerce.[60]

Other values can be extracted which reflect the sport ethic such as notions of equal opportunity for pursuit of game; private land; and legal shooting.[61] The liberal notion of equality of all individuals to pursue their goals was also a value of hunting in Western Canada. As regulation of game increased, there was a feeling that all laws ought to be applied to every hunter equally. This attitude, of course, would conflict with the special treaty rights to hunt that First Nations had secured for themselves in treaty negotiations. This attitude of equal application of

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[55] Moyles and Owram, *supra*, note 42, at 63.
[56] *An Act for the Protection of Game*, S.A. 1907, c. 14.
[57] *Ibid.*
[58] Wetheral and Kmet, *supra*, note 33, at 167.
[59] *Supra*, note 56.
[60] Donald G. Wetherell and Irene Kmet, *supra*, note 33 at 175.

the game laws, including application to "Indians", is clearly evidenced by newspaper articles and editorials in Alberta. For example, the *Macleod Gazette* in 1895 illustrates the strong anti-Indian tone of the period in an article which blames the Stoney Indians for depleting game stocks.[62] The article asserts that "the Stoney Indians are wholly responsible for the alarming decrease in big game" because they ignore the game laws.[63] Hugh Dempsey also notes that "criticisms arose during the 1890s about the Stoneys killing game for food, their critics demanding that they conform to all game laws."[64] This suggests the issue was more about equal access and opportunity than conservation and sustenance.

The notion of private lands where only the owner could hunt was also transplanted to western Canada. With individual ownership of lands, it was generally understood that the landowner could hunt animals found thereon. Others could not hunt there unless the owner granted permission to hunt.[65] With more lands taken up for settlement, all hunters had less land to hunt on, including the First Nations hunters. The exclusive use of private lands was extended to grazing leases as well. Leaseholders sought to exclude hunters and other trespassers from their leased lands on which they felt they had exclusive use.[66] The *Alberta Game Act* formalizes this notion in section 7, which prohibits hunting

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[61] Although I will briefly touch on these values next, they will be discussed in greater detail below.
[62] *Macleod Gazette*, 1895 quoted in Hugh A. Dempsey, *supra*, note 15, at 46.
[63] *Ibid.*
[64] *Ibid.*
[65] See eg. s. 7 of the *Alberta Game Act*, *supra*, note 56.

over enclosed private lands unless the consent of the owner or occupant is obtained.[67]

The notion of legal shooting also developed in western Canada from its British roots. Shooting legally precluded any poaching or other prohibited shooting. Licenses were required and hunting only on certain days and in certain manners were considered legal shooting. Closed seasons were set whereby it was illegal to hunt during such times. The rules reflected the sporting values that in turn set out what was the moral and proper way to hunt. Fair play, as discussed earlier, and certain requirements were thought to provide animals with a sporting chance thus heightening the excitement of the chase.[68] Animal parts and trophies could be taken, sold, or even exported as long as the required permits were secured. The fact that First Nations hunters hunted for their subsistence was not considered, although section 28 of the *Alberta Game Act* did provide that "any person residing or traveling north of the fifty-fifth parallel could take game for the use of himself and family."[69] However, the killing of elk, buffalo and beaver and certain birds listed in section 21 was still prohibited. Thus, even though there was indirect recognition of First Nations and Metis living in Northern Alberta subsisting on game, the Act's exception applied equally to all

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[66] For a discussion of the issues surrounding hunting on leased lands, see Arlene Kwasniak, *Alberta Public Rangeland Law and Policy* (Edmonton: Envornmental Law Centre, 1993).
[67] *Supra*, note 56.
[68] Moyles and Owram, *supra*, note 42, at 63.
[69] *Supra*, note 56.

persons residing or traveling through the north. Again, the treaty rights of First Nations were not given any special recognition or protection. Nevertheless, the values central to the sport ethic formed the basis of, and were promoted by, game regulation and enforcement. Such promotion illustrates the importance attached to sport hunting in western Canada.

2.2.1 Sporting Literature

The importance of sport hunting in early western Canada is also demonstrated in sporting literature of the time. People of the Victorian age in Canada loved sporting literature. It seems they were generally "delighted in being told, and in telling themselves, just how terribly keen, and tenacious, and sporting they were."[70] Sporting magazines and books flourished. Tales of sporting adventure often centered in Africa and India which were viewed as the 'sportsman's paradise'. However, North America was also viewed as a place for the sport of hunting. The early sportsmen who traveled to hunt in and write about British North America described Canada as a "hunter's paradise" and lured by such descriptions, "British sportsmen flocked to the new-found Eden to sample its delights."[71] Clive Phillipps-Wolley, a British sportsman,

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[70] Moyles and Owram, *supra*, note 42, at 63-64.
[71] *Ibid.* at 71. See also for examples, John J. Rown, *The Emigrant Sportsman in Canada* (Toronto: Coles Publishing Co., 1972) originally published in 1876 and Major W. Ross King, *The Sportsman and Naturalist*

reflected the English hunter who while in British North America was "occupying most of his time in hunting, writing poetry and prose, looking for good real estate investments, and promoting imperial unity."[72] These early hunters in North America sought "trophy heads" or "stuffed heads" as their ultimate prize.

Sporting writers justified the hunt by arguing that civilization could not fully suppress man's predatory instincts and that it was perfectly natural to pursue and slaughter wild animals.[73] They also emphasized "the 'health and happiness' derived from hunting, the beneficial antidote it provided to the 'purple and fine linen' of refined civilization, its contribution to the furtherance of natural history, and the effectiveness of hunters as explorers and geographers."[74] The Earl of Dunraven illustrated the feeling of the Victorian hunter:

> Towards August or September any man who has once been in the woods will begin to feel stirring within him a restless craving for the forest – an intense desire to escape from civilization, a yearning to kick off his boots, and with them all the restraints, social and material, of ordinary life; and to revel once again in the luxury of moccasins, loose garments, absolute freedom of mind and body, and a complete escape from all the petty moral bondages and physical bandages of society.[75]

Thus, according to sportsmen, the need for men to hunt was instinctual.

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in Canada (Toronto: Coles Publishing Co., 1974) originally published in 1866 and the collection of sporting narratives in Frank Oppel, ed., *Hunting and Fishing in Canada: A Turn-of-the-Century Treasury* (Secaucus, N.J.: Castle Books, 1988).

[72] Moyles and Owram, *supra*, note 42, at 74-75.

[73] *Ibid.* at 67.

[74] *Ibid.*

[75] Earl of Dunraven, "Days in the Woods" in *Nineteenth Century* Vol. 7 April, 1880, 638-57, reprinted in Earl of Dunraven, *Canadian Nights* (London: Smith, Elder & Co., 1914) 247 as quoted in Moyles and Owram, *supra*, note 42, at 66-67.

Many pages of sportsmen's literature were also spent describing the methods of tracking, stalking, luring and calling of animals as though it were a battle of wits.[76] Writers of sport hunting generally avoided creating works "smeared with blood" by downplaying the actual killing, skinning and butchering of animals.[77] They tended to gloss over those parts. Perhaps this reflects their guilt at killing or their 'sense of refinement'. For example, the Earl of Dunraven described a successful moose hunt in the typical Victorian style:

> We had called without answer all night, and were going home to the principle camp at about ten in the day, when we heard a cow [moose] call ... I will not attempt to describe how we crept up pretty near, and waited and listened patiently for hours, till we heard her again, and fixed the exact spot where she was: how we crept and crawled, inch by inch, through bushes, and over dry leaves and brittle sticks, till we got within sight and easy shot of three moose – a big bull, a cow, and a two-year old. Suffice it to say, that the big bull died; he paid the penalty. Female loquacity cost him his life. If his lovely but injudicious companion could have controlled her feminine disposition to talk, that family of moose would still have been roaming the woods, happy and united.[78]

The Earl felt that if the female moose had "controlled her feminine disposition to talk", the bull moose would still be alive. On the other hand, perhaps if he had not been playing out his Victorian masculine killing sport, that family of moose might still be united.

The view of hunting as a sport, where trophies could be taken, was a view continued well into the 1930s. Men holding these views formed powerful Rod and Gun clubs and Sportsmen Associations that lobbied

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[76] Moyles and Owram, *supra*, note 42, at 69.
[77] *Ibid.*
[78] Earl of Dunraven, *supra*, note 75, at 69-70.

Dominion and provincial governments for hunting regulations. Men with similar views became game guardians that enforced game regulations and officials in various departments of government negotiating control over hunting. This combined with the movement towards provincial rights and assumptions of European superiority resulted in jurisdictional issues and conflict between treaty rights to hunt and the rights of sports hunters being resolved in a manner that favoured sport hunting.

The extent to which the bias in favour of recreational hunting influenced outcomes, in particular delegation of game control to the provinces and enforcement of game laws is demonstrated in the review of Alberta Fish and Game Protective Association (AFGPA) files and the correspondence between Indian Affairs and Provincial wildlife managers which follow.

Chapter 3

Attitudes and Influence of the Early Game Guardians, Sporting Associations and Legislators

Wildlife managers[1] in western Canada wanted to protect sport hunting because they held British values including formal equality and paternalism. They were influenced predominantly by values, more in keeping with profit and conservation for the purpose of sport hunting, than with preserving special treaty rights for First Nations hunters. I discuss three dominant groups to show that their attitudes toward First Nations were influenced by values of sport hunting: (1) the game guardians, (2) the Alberta Fish and Game Protective Association (AFGPA), (3) and provincial legislators and policy makers. In turn, these groups pressured for sports hunting values in the legislation and its enforcement.

3.1 Game Guardians

Pursuant to the *The Game Ordinance* of the North West Territories, game guardians could be appointed to enforce the provisions of the

[1] Wildlife Managers as used here includes two of the groups discussed, game guardians (today called fish and wildlife officers) and legislators of game laws. Most game guardians were also members of the sporting associations. The Chief Game Guardian does not easily fit into these classifications. He was closer to a legislator than an actual game guardian, as he was a high level bureaucrat within the provincial Department of Agriculture.

Ordinance.[2] After Alberta and Saskatchewan gained provincial status, their own *Game Acts* contained a similar provision appointing game guardians to carry out the provisions of the *Act*.[3]

Game guardians and others involved in the management of wildlife were generally well educated, of British descent, and avid hunters. Since game guardians were sports hunters, they were expected to have intimate knowledge of the importance of 'rules of fair play' and knowledge of the game in the area. The Chief Game Guardian's report in the *Annual Reports of the Department of Agriculture* shows almost exclusively names of British heritage[4]: Heathcote, Moore, Campbell, Walker, Beveridge, McKay, Blackburn, Sutherland, Stanford, Austin, English, Aldridge, Wynn-MacKenzie, and Stelfox. Game guardians showed a strong allegiance to the King or Queen in Britain. They also had a strong belief in the rule of law, a doctrine that required the law to apply to everyone, no matter what their station in life. Consequently, they eagerly accepted game regulations and enforced them, not only because of the influence of sportsmanship values, but because they believed laws should be applied equally to all.[5]

Game guardians were also influenced at the outset by economic incentives. Most game guardians were volunteers who could retain a

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[2] Section 9 of *An Ordinance to Amend and Consolidate as Amended "The Game Ordinance" and Amendments Thereto*, O.C. No. 19, 1892.
[3] Sections 32-36 of *An Act for the Proctection of Game* S.A. 1907, c. 14.
[4] See for example Benjamin Lawton, "Report of Chief Game and Fire Guardian" in *Annual Report of the Department of Agriculture of the Province of Alberta 1911* (Edmonton: J.W. Jeffery, Government Printer, 1912) 141 at 151-159.

portion of the fines imposed.[6] Full time, paid game guardians were utilized, but at the outset were relatively few in number. The lack of remuneration for full time employment meant that sport hunters tended to volunteer and provided the incentive to try to convict people in order to get paid.[7] For example, an undated letter from the Office of the Game Commissioner to William Cooper Smith approving his appointment as a game guardian states that voluntary game guardians who secure convictions or where their testimony as a witness secures conviction, would be entitled to remuneration of 75 % of the penalty collected up to $20; and 50 % of the amount over the $20.[8] Furthermore, in order to encourage persons to report illegal hunting and fishing, a complainant could receive a moiety of the fine.[9]

Game guardians would feel no guilt in securing convictions against Whites or First Nations because any hunter who deviated from the regulations was obviously carrying out illegal shooting, which of course, was unsportsmanlike. As argued earlier, the requirement of licenses to hunt legally reflected the sportsmanlike nature of hunting regulations. Unless all hunters followed the rules, there was no fairness to hunters or

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[5] This will be further demonstrated in Section 3.2 below.
[6] Provincial Archives of Alberta [PAA] 95.32 William Cooper Smith file, undated letter from J.F. Andrew to William Cooper Smith.
[7] Benjamin Lawton, "Report of Chief Game and Fire Guardian" in *Annual Report of the Department of Agriculture of the Province of Alberta 1905-1906* (Edmonton: Jas. E. Richards, Government Printer, 1907) at 134 where he states "the present system of enforcing the provisions of the Ordinance has not proven satisfactory as the majority of the guardians argue that, there being nothing in it for them, it is not to their interest to lay information against and prosecute their neighbour."
[8] PAA 95.32 William Cooper Smith file, undated letter from J.F. Andrew to William Cooper Smith.
[9] Glenbow Archives [GA], M1327 Box II File No. 23, letter from the Deputy Minister of the Department of Naval Service dated March 30, 1915 to John F. Eastwood of Calgary.

to the game animals, which deserved a sporting chance. Thus, the restrictions on time and method of hunting could be thought of as sportsmanlike rules and easily enforced by the sportsmen hired to enforce them.

In addition to economic incentives, three key factors influenced the opinion of game guardians: the promotion of equality between all hunters and principles of sportsmen through their discretion to enforce; paternalistic attitudes and assumptions of colonizers (such as the inevitability of progress and expansion into the west and north, which justified assimilating First Nations cultures into the progressive European culture); and placing sportsmen and values of sport in a favourable position over Indians with regard to access to game. In short, these game guardians were generally sportsmen who viewed Indians as competition for scarce wildlife resources. This is demonstrated below through two historical case studies.

3.2 Attitudes and Influences of Game Guardians

3.2.1 Promotion of Equality and Sporting Behaviour

The attitudes and opinions held by game guardians were important factors in bringing First Nations hunters under provincial game regulations. They had influence on policy formulation and enforcement

as government employees and as members of sporting associations. The Chief Game Guardian consulted other game guardians on the content of game laws. They also played a direct role in the enforcement of game laws and sought to apply the game laws equally to every hunter. Chief Game Guardian Benjamin Lawton provides an example. He argued for equal application of the game laws to Indians and Whites by stating:

> The Game Act states that no person shall hunt, trap, shoot at, would or kill, etc. ... I do not think that anyone will contend for one minute that an Indian is [not] a person, consequently the Act is intended to apply to all persons meaning Indians as well as white men and half breeds.[10]

Such a position was detrimental to First Nations hunters who relied on game for their traditional livelihood. If First Nations hunters could not hunt they were at risk of being without a valuable and necessary food source. The federal government did not wish to provide rations to groups who were otherwise self-sustaining.

Settlers and sportsmen had alternative sources for subsistence, but First Nations generally did not. There was little appreciation or understanding of the special treaty status of First Nations to hunt. The purpose of applying the game laws to First Nations was to remove any perceived advantage First Nations might have by not complying with closed seasons and restricted hunting methods. Such restrictions on hunting were reflective of the sport hunting values which received the

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[10] Benjamin Lawton, "Report of Chief Game and Fire Guardian" in *Annual Report of the Department of Agriculture of the Province of Alberta 1908* (Edmonton: Jas. E. Richards, Government Printer, 1909); see

force of law. Game guardians had no problem ignoring the special treaty rights of First Nations in enforcing the game laws since they felt the law should apply equally to all no matter what their special circumstances were. This value for equality before the law was shared among and between game guardians, sports associations and provincial legislators.

3.2.2 Paternalism and Sport

Game guardians had paternalistic attitudes toward First Nations and although some sympathized with the plight of First Nations, they generally recognized the need to balance First Nations' rights against sport. For example, Henry Stelfox, a game guardian from the Wetaskiwin district, sympathized with First Nations. He claims that "As a hobby, I have taken a lot of interest in Indian Affairs."[11] Stelfox was President of the Rocky Mountain House Fish and Game Association for 17 consecutive years. Stelfox was also an Indian Agent for a time and was a member of the Government Game Advisory Council on which he claimed he represented the Indians of Alberta.[12] He worked among the Stoney Indians during the winter of 1907-08 and learned much from their oral

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also Jack Ondrack, *Big Game Hunting in Alberta* (Edmonton: Wildlife Publishing Ltd., 1985) at 338 where an excerpt of this report is reprinted as Appendix B of his report.

[11] GA, File No. M1175, hand written letter from Stelfox to George Gooderham dated February 5, 1972.

[12] GA, File No. M1175, handwritten biography of John Stelfox at 3.

histories. He eventually was appointed as game guardian in 1908.[13] In 1909 he was elected Councilor for the local Improvement District of Battle Lake and also appointed Justice of the Peace.

In an address given to the "Members of the Royal Society of Canada", Stelfox discussed the early history of the Rocky Mountain House area, wildlife, and Indians. He spoke of the good job being done by the Alberta Government in controlling big game animals and predators -- meaning that he was satisfied with the wildlife regulations in place.[14] Stelfox also spoke of the non-treaty Chippewa Indians in the foothills who were pushed out by white settlers "Their favorite camping spots have been bartered and fenced, their hunting and fishing grounds are but a memory of the past".[15] He reflected the general Euro-Canadian attitude of the time that First Nations traditional lifestyle was quickly passing, which was sad, but not necessarily a bad thing.

Stelfox recognized that First Nations had special treaty rights. Many settlers had a vague idea that First Nations had special rights under the treaty, but few sought to understand them. Stelfox remarked:

> **I have served different departments of our Government in this country for many years, And I still believe, knowing many of the representatives of our Government as I do, that they have no wish or intention of seeing abused those promises made to the Alberta Indians in 1877 by the representatives of the late Queen Victoria.[16]**

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[13] Stelfox's name does not appear in the list of game guardians for 1909 but does appear on the list of game guardians in the "Report of Chief Game and Fire Guardian" in the *Annual Report of the Department of Agriculture of the Province of Alberta 1911* (Edmonton: J.W. Jeffery, Government Printer, 1912) at 159.
[14] GA, File No. M1177, Folder 2, Speaking Notes of Address to Members of the Royal Society of Canada.
[15] GA, File No. M1177, Folder 2, typed narrative entitled "Desolation".
[16] *Ibid.*

In this regard, Stelfox reflected the minority attitude, that is, of settlers who sought to understand First Nations culture, their rights, and their needs. Although he felt the Alberta Government would not intentionally breach treaty promises, he nevertheless supported game legislation that the province sought to have apply to all hunters, including treaty Indians. This position was influenced by his attitude toward the value of commercial and sport hunting.

As sympathetic as he was to First Nations, Stelfox still reflected the paternalistic attitude. For example, when discussing totem stones discovered in Honduras (which were intricately carved figures of men) he stated; "This wonderfully fiercesome art, which shows art of a very high standard could not have been the work of savages. It must have been accomplished by someone of a high state of civilization."[17] He also argued that the Mayan race "had attained a higher grade of culture than any other American people" which led him to conclude they must be "descendants of the tribe of Lehi who were driven out of Jerusalem about 600 B.C".[18]

There were other exceptions to the general attitudes of game guardians towards First Nations hunters. Another sympathizer of special rights for First Nations was Frenchie Riviere of Pincher Creek, a game guardian in northern Alberta, from 1911 to 1928. He defended First

[17] GA, File No. M1175, collection of short narratives on various topics, at 52.

Nations hunters and trappers in west central Alberta who found themselves in conflict with the newly created Parks and Forest Reserves. In a letter to the editor of *Outdoor Life*, Riviere voiced his strong objection to an earlier article written by Major Townsend Whelen, who in "a long tirade against half breeds and Indians ... goes so far as to state that policies keep the Grande Cache half breed from being ejected from the Forest Reserve where they located entirely without permission."[19] Riviere attempted to correct this misinformation by stating "the privileges promised these people when they consented to sell out of Jasper Park was that of settling elsewhere unmolested, acting in good faith they settled at Grande Cache about 100 miles from the rail road ... "[20] Riviere claimed that Whelen got his information from a sportsman, Clark, who had an interest as a guide and was in competition with the Grande Cache Indians who occassionally guided sport hunters. Riviere stated it is wrong to accuse Indians of hunting game to the point of extinction and that such information was false.[21]

Riviere also defended the First Nations trappers in a letter to the Game Commission of the Province of Alberta, where he drew attention to

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[18] *Ibid.* at 53.
[19] GA, File No. 8583 undated draft of letter in hard cover bound journal, p. 183.
[20] The Iroquois free trappers along the mountains near Jasper were forced to move once Jasper National Park was created and they were promised they could stay where they settled to the north. However, a forest reserve was created and they were asked again to move, whereupon they moved up to the Grande Cache area along the mountains south of Grande Prairie; See Trudy Nicks, "The Iroquois and the Fur Trade in Western Canada" in Carol M. Judd and Arthur J. Ray, eds., *Old Trails and New Directions: Papers of the Third North American Fur Trade Conference* (Toronto: University of Toronto Press, 1980) 85.
[21] GA, File No. 8583 draft letter to the Game Commission of Alberta in hard cover bound journal.

the "evil results of the closing of the Forest Reserves in Alberta to trappers".[22] He argued:

> I am well aware that the regulation prohibiting the trapping in the forest reserves was engineered by the forestry officials as a means of driving the Moberly outfit [Iroquois free traders] out of the Athabasca forest reserve where they had a legal right to be. But I do not see why the Provincial authorities should join in persecuting these people, and prohibiting them to trap on the forest reserves where they had been hunting and trapping for centuries thereby depriving them of an honest means of making a hard earned living was certainly persecution.[23]

Mr. Riviere's debate with Whelen and the letter to the Game Commission illustrates how sportsmen who viewed First Nations hunters as direct competition would use information and misinformation to paint a picture of First Nations as wanton destructors of game. Such perceptions rarely sought to understand the importance of hunting as a traditional livelihood. Aboriginal rights based on prior occupation and usage seemed to be overlooked or dismissed. Nevertheless, Riviere like other game guardians saw no problem with the same game laws being applied to Indians as White hunters and upholding the sporting values of the game law. The influence of sportsmen on the development and enforcement of game law is elaborated upon on below.

3.2.3 Conservation and Sport

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[22] *Ibid.*
[23] *Ibid.*

Stelfox expressed the attitude of most game guardians and managers of the period when he stated, "In short, the administration of Alberta's Wildlife must be conducted as a business by men who are capable of making a success of it and who are competent to recreate that which in the past has been torn down and exhausted almost to the point of extinction."[24] He argued that there is a need to educate people that the Game Laws are for their benefit, that they must appreciate Wildlife, and that they need to thank the Creator for the land and Wildlife. He stated people will benefit, "By farming the Wildlife of Alberta, And conducting it in a scientific and businesslike manner; And smilingly giving our time in assisting to make it the revenue producing asset and drawing card for tourists which you and I would like to see."[25] However his reasoning does not appear to relate to conservation for the purpose of protecting wildlife or harvesting for subsistence. Rather, the economy around game was to be promoted, especially with respect to trophy or sports hunters which he regards as tourists when he stated "tourists will have game to pursue."[26] This economy around game rarely involved First Nations' participation.[27] Although a regulated commercial hunting market was promoted in the game laws, such rules served the needs of

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[24] *Ibid.*
[25] *Ibid.*
[26] *Ibid.* It will become clearer through the discussions below that most sportsmen and game guardians used the term "tourist" to mean "trophy hunter". However, later on in time this term began to be used in a broader context with "observers" of wildlife.
[27] Although First Nations played an active role in the fur trade, they played a minor role in the guiding trade where White sportsmen and businessmen dominated.

the non-Aboriginal population.[28] When First Nations attempted to take advantage of any demands for products of the hunt, they met opposition from sportsmen and game officials.[29]

Stelfox was also clearly convinced of the virtue of sport hunting. He wrote "The Passing of the Carobou" that contains the following verse:

> Oh God protect all this Wildlife!
> Frame the laws of man to check the kill.
> I saw a thousand head killed yonder!
> Just slaughtered over that big hill.[30]

Stelfox was also quick to defend sportsmen by reacting to an article in a Canadian sporting magazine where Tony Lascelle argued that sportsmen in Alberta have a monopoly over wildlife that belongs to all Albertans. He responded by stating that Alberta sportsmen devote time and money towards conservation of wildlife including importing game birds.[31] Thus, he reflects the attitude among sportsmen and game officials that sportsmen were devoted to the conservation of wildlife.[32] Like most sports hunter supporters, Stelfox did not elaborate on why they have an interest in conserving wildlife, but it is logical to conclude that the conservation of game was to ensure a supply of game for sportsmen.

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[28] Although I use the term "commercial hunting" to discuss the sale of products of the hunt, the game laws and Chief Game Guardians reports refer to "market hunting".

[29] National Archives of Canada [NAC], Public Records of the Department of Indian Affairs, RG 10, Vol. 6732, file 420-2, type written letter from P.L. Grasse, Farmer at Stoney Reserve dated February 24, 1896 addressed to the Indian Commissioner, Regina wherein Grasse states that a Stoney hunter was convicted of selling a head and meat of mountain sheep.

[30] GA, File No. M1175, in booklet by Henry Stelfox, *When the Sawflies Mate in Summer and Other Alberta Poems.*

[31] *Ibid.* in a narrative entitled "Observations of a Regional Representative".

[32] See eg. John F. Reiger, *American Sportsmen and the Origins of Conservation* (Revised Edition) (Norman: University of Oklahoma Press, 1986) who argues that American sportsmen hunters played a

In a narrative entitled "From a Regional Perspective", Stelfox provides an illustration of the close relationship between game guardians, fish and game associations representing sport hunters, and the drafters of game laws. He argued that sportsmen of Alberta "must co-operate 100% with our government and with those appointed by our government to administer Fish, Fur and Game".[33] He further states, "Co-operation by all the members of Fish, Fur and Game organizations with their Regional Representative is essential; so that he is in a position to bring before the members of the executive of the parent association matters which are of vital importance to our government in the drafting of Game Laws."[34] He also asserted that "the people" are the government in democratic countries and that there is a necessity to cooperate with Members of the Legislative Assembly and other government representatives.[35] Stelfox also stated that it is important to meet with those holding office who might not know much of Alberta's wildlife and land because this is "important for guaranteeing a steady increase of revenue from that source for the future."[36] He stated that the Game Commissioner, or any of his staff, appreciate it when the Fish and Game Associations meet with them. To him, the Fish and Game Associations play an important role for democracy and a mechanism to foster Wildlife

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leading role in starting and supporting the conservation movement in the 1870s and that they have been strong finanical backers of conservation measures.

[33] *Ibid*, in a narrative entitled "From a Regional Perspective".

[34] *Ibid.*

[35] *Ibid.*

[36] *Ibid.*

for "those who have gone over seas to fight for democracy and to uphold all these traditions and principles so dear to every clean thinking Britisher."[37] For those interested in Alberta's future, according to Stelfox, it should be easy to "work with our Government in making Alberta Wildlife, the magnetic drawing card so necessary as an attraction for the much needed tourist trade."[38]

It is important to note that First Nations were not consulted by the provincial government officials respecting the regulation of First Nations' rights to hunt despite the existence of Treaty rights and federal fiduciary obligations to protect those rights. The Dominion government with exclusive jurisdiction over "Indians and lands reserved for Indians" owed a duty to First Nations to protect their lands and rights. With the treaty promises to protect the traditional livelihood rights of First Nations, the Dominion government had a duty to ensure those rights to hunt and fish were respected. Only in the case of necessity, in order to preserve the game for the benefit of the First Nations, they had assured the Chiefs and Headmen, would they utilize the proviso in the treaty hunting clause and make laws from time to time. First Nations did not have provincial representation, as they could not vote, and were basically ignored by

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[37] *Ibid.*
[38] *Ibid.*

provincial governments since it was assumed they fell under federal jurisdiction and were viewed as solely a federal problem.[39]

The foregoing examination shows that there is evidence of a close relationship between game guardians, fish and game associations, and game legislators. In fact, many game guardians were also members of the Alberta Fish and Game Protective Association.[40]

3.3 Alberta Fish and Game Protective Association (AFGPA)

The Alberta Fish and Game Protective Association (AFGPA) was an early sportsmen association which preceded the Alberta Fish and Game Association. Both had similar purposes and shared similar values – to act as the lobby for sports hunters and fishers. The latter grew out of a meeting when conservationists C.A. Hayden and Dr. R.F. Nicholls of Edmonton met with the Calgary Fish and Game Association in Calgary on July 11, 1928.[41] The former grew out of local Rod and Gun Clubs throughout southern Alberta. Members of these sportsmen associations were avid sports hunters and fishermen who began to call for increased

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[39] First Nations did not have full rights of citizenship and were precluded from voting until 1960. Further, in 1927, the *Indian Act* was amended to prohibit anyone from raising money for First Nations to bring a claim against the government. They were essentially politically powerless. Regarding voting, see eg. Darlene Johnston, "First Nations and Canadian Citizenship" in William Kaplan, ed., *Belonging: The Meaning and Future of Canadian Citizenship* (Montreal: McGill-Queen's University Press, 1993). Regarding the prohibition of First Nations claims, see eg. E.B. Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: University of British Columbia Press, 1986) at 157.

[40] For example, Henry Stelfox was both a game guardian and a strong advocate of game associations.

game regulations to protect game populations. An illustrative example of the sportsman was Leonard E. Wize who was "better known as an ardent conservationist, big game hunter, angler and trapshot", and also "well known throughout the west as a fearless fighter for advanced legislation and for sound game management.[42] Sportsmen dominated the organization and were encouraged to take an active role in the formation of game legislation. Indeed, one could argue that the main purpose for the formation of the AFGPA was to lobby government for their interests. For example, George Hoadley, Minister of Agriculture addressed one meeting and "advanced the opinion that any government would rather deal with one central body than a number of small organizations, each with a decidedly different viewpoint."[43] Apparently, the provincial government was "anxious at all times to listen, to enact, and to co-operate with this central body."[44]

A 1912 letter from Wooley Dod of the AFGPA to a member of the Vancouver Gun Club reflects the idea that their organization is a lobby group for sportsmen:

> **One of our main objects is to get legislation passed to meet local requirements, and the introduction and protection of game birds from other provinces and countries which are likely to be beneficial to sport.[45]**

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[41] George M. Spargo, "An Article on the History of the Alberta Fish and Game Association" in the Alberta Fish and Game Association, *Twelfth Annual Report*, Calgary, January 27, 1940, 19 found in GA, M1327 Box II File No. 36.
[42] *Ibid.*
[43] *Ibid.*
[44] *Ibid.*
[45] GA, M1327 Box II File No. 22, typed letter from Wooley Dod dated January 24, 1912 to E.G. Burtch of the Vancouver Gun Club.

As discussed above, sportsmen were of the British gentlemen class. Therefore, it is not surprising that AFGPA annual meetings were steeped in British traditions. The Programme of the 17th Annual Convention of the Alberta Fish and Game Association agenda begins with the singing of "O Canada" followed by "The King" and ends with "Auld Lang Syne".[46] Interestingly, the 17th Annual Convention programme's cover contains the motto "Game is a Crop" signaling the economic and utilitarian values placed on wildlife by the sportsmen of the AFGPA.

Austin Winter, an active member of the Alberta Fish and Game Protective Association, accumulated many files on the Association's matters. These files show it is an association with an interest in regulating game hunting and developing legislation.[47] Annual meetings often involved reviews of regulations that resulted in recommendations to amend draft regulations. For example, D. A. Darker's President's Annual Report 1909, covered the *Game Act* in a clause-by-clause overview. In his speech, Darker states, "As your President for the past two years I thank those who have so heartily supported me in co-operating with the Constitutional Authorities for the preservation and better protection of our fish and game ... "[48] This illustrates that the Association co-operated

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[46] GA, M1327 Box I File No. 46.
[47] For example, a AFGPA folder at the archives holds various copies of statutes and regulations including the *Migratory Birds Convention Act*, the *Game Act*, the *Fisheries Act*, and the *Special Fishery Regulations for the Provinces of Manitoba, Saskatchewan, Alberta and the Northwest Territories*, as well as, an extract from the *Canada Gazette* GA, M1327 Box I File No. 44.
[48] GA, M1327 Box II File No. 21.

with those with the authority under the constitution to legislate game and fish. In other words, they played a very active and influential role.

In February of 1910, C.H. Pinnell made suggestions based on his "many years experience as a game guardian, regarding the protection of game in the province."[49] He suggested that every person carrying a gun be required to obtain a gun license and it was not fair "to the man that pays his game license."[50] This illustrates the idea of equality among hunters no matter the circumstances. Such beliefs likely made it difficult for them to appreciate the "special right" of treaty First Nations.

File correspondence shows the direct input by the AFGPA on game laws and policies. For example, a letter from A.T. Kinnaird of the Wetaskiwin branch of the AFGPA dated July 14, 1910 to the Secretary Treasurer H.G. Garrett of the Calgary office, proposes amendments to the *Game Act* that were circulated among the Association branches for review and suggestions.[51] Kinnaird instructed in his letter, "send a copy of the proposed amendments to each of the branches ...". and once all branches considered the proposal, he wishes to hear back from Garrett since:

> **it has been suggested by Mr. Lawton, Chief Game Guardian, that a deputation meet the Government with the proposed amendments as approved of by the Association and its branches, and we will then endeavor to make arrangements to do this or take whatever steps may be considered necessary by the Association to bring the matter before the Legislature.[52]**

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[49] GA, M1327 Box II File No. 21, Handwritten letter from C. H. Pinnell dated February 7, 1910 addressed to D. E. Sisley.
[50] *Ibid.*
[51] GA, M1327 Box II File No. 21.

The amendments considered at this time were related to the traffic in game birds. The proposal sought to place restrictions on commercial hunters as well as the purchasers of such game.[53] It sought to impose licenses and provided that "no person may buy, sell, barter or exchange any game bird except geese, duck, snipe, sandpiper, plover or curlew."[54] The market for game products was encouraged, however, regulations were introduced to regulate the market. Sportsmen were in support of the regulation of commercial hunters since sportsmen believed market hunters were one of the major causes of the depletion of game. Requiring licenses for commercial hunters was viewed as an effective way to monitor and control the amount of animals taken for sale or trade. Sportsmen preferred tight regulation of commercial hunting so that the game could be conserved for the benefit of sport. The game market also illustrates the economic value placed on game animals by game legislators. Not only did the harvest of animals create wealth for the market hunter and traders, but also provided revenue for the province through licenses and other fees.

A review of the Reports of the Chief Game and Fire Guardian in the Department of Agriculture's Annual Reports illustrate the encouragement of the traffic in game products at this time and shows why sport hunters were concerned. As one example, the 1913 Chief

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[52] *Ibid.*
[53] The term commercial hunter was generally used in these historical records as "market hunters".
[54] *Ibid.*

Game Guardian's report states that the "*Game Act* as it stands at present permits the indiscriminate sale of these birds [ducks, geese and swans] by any person who chooses to pay the price for the market hunter's license."[55] Lawton showed that 56 geese market licenses and 15,339 duck market licenses were issued in 1913.[56] Lawton expressed alarm about the number of market licenses sold when he says, "never before in the history of Alberta were so many licenses of this kind sold as in 1913, nor were so many birds sold as during the past season".[57] Also issued that year were 7 market licenses for deer; 3 market licenses for caribou; and 43 market licenses for moose. The province encouraged fox and mink farms for providing animal furs for the market and Lawton states that the establishment of fox farms in the province "will no doubt be a profitable venture to the majority of those who engage in it".[58]

The growth and strength of sporting associations and the political clout they mustered is also illustrated in collaborative lobbying efforts. For example, a letter from the Secretary Treasurer of the Audubon Society of Alberta to the Secretary of the AFGPA states that they (along with the AFGPA, the Natural History Society of Alberta and the Strathcona Sporting Club) make joint recommendations for amendments

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[55] Benjamin Lawton, "Report of Chief Game and Fire Guardian" in the *Annual Report of the Department of Agriculture of the Province of Alberta 1913* (Edmonton: J.W. Jeffery, Government Printer, 1914) 76.
[56] *Ibid.* at 77.
[57] *Ibid.* at 77.
[58] *Ibid.* at 78.

to "the present Game Law."[59] With joint submissions the sports associations had strength in numbers, which translated into political strength. Austin Winter in a letter in 1923 suggested "a joint meeting of the Game Association and the Gun Club to discuss proposals to lay before the Government ... "[60]

A.T. Kinnaird of the Northern Alberta Fish and Game Protection League wrote to Austin Winter of the AFGPA stating that the "Hon. Mr. Hoadley has asked this League get in touch with your League and find out whether or not you care to send representation to Edmonton to discuss some proposed Amendments to the *Game Act* and other matters along that line."[61] Austin Winter replied to Kinnaird and stated that the two groups could work together and have a resolution from one group be supported by the other, "I am quite sure that we shall either send written representations or a delegation to Edmonton to meet with the Minister."[62] The Chief Game Guardian expressed his pleasure "to have any suggestions which you may have to make ... "[63] Thus, the collaborative efforts of the various fish and game associations played a significant role in the formation of the game laws.

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[59] GA, M1327 Box II File No. 21, typed letter dated March 14, 1910 from the Secretary Treasurer of the Audubon Society of Alberta to the Secretary of the AFGPA in Calgary.
[60] GA, M1327 Box II File No. 28, typed letter from Austin Winter dated December 5, 1923 to W.D. Elliott of High River, Alberta.
[61] GA, M1327 Box II File No. 28, typed letter from A.T. Kinnaird of the Northern Alberta Fish and Game Protection League in Edmonton dated January 31, 1924 to Austin Winter.
[62] GA, M1327 Box II File No. 28, typed letter from A. Winter dated February 11, 1924 to A.T. Kinnaird.
[63] GA, M1327 Box II File No. 28, typed letter from B. Lawton, Chief Game Guardian dated March 19, 1924 to A. Winter.

The AFGPA also made direct contact with MLAs to ensure they stayed informed and had input in the development of regulations. For example, AFGPA Secretary Austin Winter wrote to Duncan Marshall, Minster of Agriculture, for notice to be given to his association regarding proposed changes to the *Game Act* so they could consider them and give their views.[64]

The influence of the game associations on MLAs is illustrated by a statement of G. Hoadley, an MLA who would later become Minister of Agriculture, "The opinion of the various Game Associations has been solicited and very freely given from time to time while the Act was in the course of preparation."[65] This influence continued into the early 1930s when the western provinces negotiated with the Dominion of Canada for the transfer of jurisdiction and ownership of natural resources to the provinces. This influence is evident in the following letter from Game Commissioner S.H. Clark, to Austin Winter "the open seasons and bag limits are established after complete investigation of the existing conditions with the recommendations of the Fish and Game Associations and residents of the Province who are interested in conservation."[66]

Although the AFGPA members supported specific regulatory measures such as closed seasons on some game, they opposed complete

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[64] GA, M1327 Box II File No. 23, typed letter from AFGPA Secretary A. de B. Winter dated April 7, 1916 to the Hon. Duncan Marshall, Minister of Agriculture.
[65] GA, M1327 Box II File No. 30, typed letter from G. Hoadley dated March 24, 1932 to A. Winter.
[66] GA, M1327 Box II File No. 30, typed letter from Game Commissioner S.H. Clark dated August 1933 to A. Winter.

closure on all animals and birds. This is evident in a 1923 letter from Austin Winter wherein he stated "in view of the rumpus then created by the Farmers' party who at the time wished to put a close[d] season on all game birds, it was considered inopportune to urge that view to the Legislature."[67]

The AFGPA also sought to play a role in having fisheries regulations enforced in Alberta. For example, the AFGPA Secretary Treasurer A. Wooley Dod, in a letter to the Honourable Senator Lougheed in Ottawa, sent various recommendations to have them enforced in Alberta and urged him to "use your influence in having them carried out" because of differential enforcement.[68] Enforcement of the recent *Fisheries Act* amendments was not uniform. This is illustrated in a letter from F.W. Godsal of Cowley, Alberta to Wooley Dod that the *Calgary Herald* newspaper had given a "different version of the Fisheries Act in June 8th. Police are charging at Crows Nest Pass but Magistrates have no Fisheries Act and must dismiss."[69]

The AFGPA were kept informed of the decisions reached in the legislature through direct connections. For example, Robert Pearson, Member of the Legislative Assembly for Alberta, stated in a letter to A. Winter, Secretary of the AFGPA, that the Agricultural Committee debated

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[67] GA, M1327 Box II File No. 28, typed letter from Austin Winter dated December 5, 1923 to W.D. Elliott of High River, Alberta.
[68] GA, M1327 Box II File No. 22, typed letter from Wooley Dod dated June 7, 1912 to the Honourable Senator Lougheed.
[69] GA, M1327 Box II File No. 22, typed letter from F.W. Godsal dated June 11, 1912 to Wooley Dod.

the open season for prairie chicken and Hungarian partridge and that certain proposed regulations were carried through the Committee.[70] When the AFGPA were not kept closely informed, they tended to voice their frustrations quite clearly. As Austin Winter demonstrates in a letter of 1926, a major objection was the fact that "recommendations are brought in by the Chief Game Guardian without any notice to parties interested, and nearly every year there is a hectic rush by interested sportsmen who are required to call hurried meetings and make recommendations to the Government."[71] Thus, having input into the process was acknowledged, but at times, it was felt that the time to consider such regulations was not long enough.

3.3.1 Relations with American Sportsmen and Wildlife Managers

The importance of preserving game for sport hunting is also evident in the close connection with American lobby groups with similar aims. Such collaborations strengthened the knowledge base and information the AFGPA used to lobby for legislation.

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[70] GA, M1327 Box II File No. 27, typed letter from Robert Pearson, of the Legislative Assembly dated March 9, 1922 to A. Winter.
[71] GA, M1327 Box II File No. 28, typed letter from Austin Winter dated January 29, 1926 to W.D. Elliott of High River.

Canadian wildlife naturalists and civil servants interested in conservation had continuous contact with their American counterparts.[72] So did those interested in the protection of sport hunting. Canadian fish and game conferences often had American wildlife managers, conservationists and sportsmen attend and give speeches.[73]

These relations are illustrated by a letter from the Editor of *Recreation* [74] to Wooley Dod of the AFGPA asking for information about their organization to add to the "data concerning the extent to which the sportsmen of this country are organized."[75] Further evidence of the relationship is illustrated in the following list: (a) correspondence between the AFGPA and the University of Wisconsin Entomology Department in 1914 where information including statutes and regulations were sent to Wisconsin to "be distributed to our course of forest rangers who are making a study of bird, fish and game conservation"[76]; (b) letter from the California Fish and Game Commission replying to A. Winter's correspondence regarding the formation of a game

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[72] Foster, *Working for Wildlife: The Beginning of Preservation in Canada* (Toronto: University of Toronto Press, 1978). See also Dan Gottesman, "Native Hunting and the Migratory Birds Convention Act: Historical, Political and Ideological Perspectives" (1983) 18:3 *Journal of Canadian Studies* 67.

[73] Committee on Conservation Annual Reports illustrate the connection with Americans where American examples are referenced or where American speakers attend to give presentations. Also, the Annual Reports of the Chief Game Guardian contained in the Department of Agriculture Annual Reports have many references to what Americans are doing and also published a table annually of the various states and provinces open and close seasons for hunting.

[74] *Recreation*, a New York based magazine for sportsmen.

[75] GA, M1327 Box II File No. 21, typed letter from Edward Cave, Editor of *Recreation* magazine to Wooley Dod of AFGPA, Calgary.

[76] GA, M1327 Box II File No. 23, typed letter from A.C. Burrill, Director of Wisconsin Audobon Society and Assistant Entomonogist at University of Wisconsin dated February 14, 1914 addressed to President A.G. Wooley Dod; typed letter from Chief Game Guardian Lawton dated February 20, 1914 to Wooley Dod.

commission as well as about gun materials and sizes[77]; (c) an application form to join the American Fisheries Society in the AFGPA files[78]; (d) letter from the President of the Wisconsin Aquatic Nurseries to Austin Winter, stating that "Many Hunters and Fishermen from your district have written us throughout the past year asking our advice and help toward developing better feeding grounds for Wild and Waterfowl and Fish"[79]; (e) an invitation sent to the AFGPA in 1928 for members to attend the Fifteenth National Game Conference at New York City sponsored by the American Game Protective Association of which W.W. Cory of Canada was the third Vice Chair[80]; and (f) a letter in the spring of 1929 regarding the "largest convention of outdoor enthusiasts ever assembled will convene" at Chicago for the Seventh Annual Convention of the Izaak Walton League of America.[81]

3.3.2 National Meetings

The importance and influence of the AFGPA on government policy relating to hunting is demonstrated in national meetings to which game

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[77] GA, M1327 Box II File No. 27, typed letter from Edwin Hedderly, Assistant in charge of the California Fish and Game Commission dated March 16, 1922 to A. Winter.
[78] GA, M1327 Box II File No. 28, one page printed "Application for Membership" form to join the American Fisheries Society from the 1920s.
[79] GA, M1327 Box II File No. 28, typed letter from Wm. O. Coon, President of Wisconsin's Aquatic Nurseries to Austin Winter, no date.
[80] GA, M1327 Box II File No. 28, typed invitation from the American Game Protective Association to attend the Fifteenth Annual Game Conference in New York City December 3-4. 1928.
[81] GA, M1327 Box II File No. 28, typed letter from Henry Baldwin Ward, President of the Izaak Walton League of America dated March 23, 1929 to A. Winter.

officials and AFGPA members were invited. For example, the Annual Round Table Conference of Provincial and Federal Game Officials was held in Ottawa on February 6, 7, 8, 1924 under the auspices of Canadian National Parks.[82] The conference was opened by the Hon. Charles Stewart, federal Minister of the Interior, who referred to "the great need of protective measures to conserve the country's valuable Wildlife, including fur-bearing animals, game animals and birds, and to the fact that the fur-bearing animals formed the chief means of support of Canadian Indians, lacking which the Indians would become a much heavier charge upon the Dominion."[83] Minister of the Interior Stewart also stated that the trapping of fur was a very valuable revenue to the country.[84] Although he expressed concern for the supply of game for First Nations' use, the feeling was generally towards conservation of the game so other interests could continue to enjoy their sport.

Like many men with an interest in conserving game, Minister Stewart referred to his "many enjoyable days in hunting" and expressed that "it would be criminal, to say the least, to permit the pleasure and benefit to be derived from hunting to cease through the dissipation of our natural resources."[85] The conference was marked by a "spirit of co-

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[82] GA, M1327 Box II File No. 28, "Resolutions Adopted at the Recent Conference of Provincial and Federal Game Officials" attached to a typed letter from J.B. Harkin dated May 14, 1924 to A. Winter.
[83] *Ibid.*
[84] *Ibid.*
[85] *Ibid.*

operation" with resolutions "adopted unanimously" and was represented by game officials from across the country.[86]

Federal representatives at this conference included J.B. Harkin of Canadian National Parks; Hayes Lloyd, Supervisor of Wildlife; J.A. Munro, Chief Federal Migratory Bird Officer for the Western Provinces; as well as representatives from various departments such as Department of Agriculture, Department of Indian Affairs, Department of Justice, Department of Marine and Fisheries, and the Royal Canadian Mounted Police.[87]

The provinces jealously guarded their jurisdiction as is illustrated in a resolution passed at the Conference of Provincial and Federal Game Officials in the spring of 1924:

> RESOLVED that we desire Dominion Legislation to give extra territorial effect to the Game laws of the respective Provinces extending throughout Canada:
> AND THAT the Game Officers of each Province should be ex-officio Game Officers of all the other Provinces in respect to game having its origin in any such other Province, but that no Dominion special officers should be appointed.[88]

The resolution provided that game laws in each province apply to game imported into a particular province. It also expressed that no federal

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[86] Conference participants included: President of the Prince Island Game and Fish Protective Association, A.E. Morrison; Commissioner of Game and Forests for Nova Scotia, J.A. Knight; Deputy Chief Warden of New Brunswick, G.F. Burden; J.A. Bellisle, Superintendant of Fish and Game of Quebec; I. Heckt, Game Inspector of Montreal; Dr. J.U. Delisle, Game Officer from Hull; Mr. Quinn, District Game Warden; and Mrs. J.A, Wilson representing the National Council of Women. Alberta was represented by Chief Game Guardian Benjamin Lawton, while Saskatchewan was represented by Chief Game Guardian F. Bradshaw. See *Ibid.*

[87] *Ibid.*

[88] *Ibid.*

officers should be appointed. Rather, it calls for provincial game officers be given the authority to handle the matters.

The federal and provincial game officials at the conference did consider the special circumstances of First Nations in the preamble of another resolution where they "considered it desirable that all hunters in Canada other than Indians and Eskimos should be under some sort of registration."[89] There was some recognition of the special status and unique circumstances of the First Nations of Canada. Conservation measures were part of the reason for this resolution for adopting a license policy as illustrated in the preamble:

> AND WHEREAS information regarding the number of game animals and birds killed annually by hunters is considered of great importance in the drafting of protective legislation;
> AND WHEREAS such information could be compiled where all hunters [are] required to take out a license and make returns on all game animals and game birds killed under such permits.[90]

Thus, game officials wanted game management measures to become part of legislation, but at the same time there was some awareness that First Nations hunters were under federal jurisdiction. Game departments were government's administrative arm and their officials sought to legislate all hunters.

3.3.3 Commission of Conservation

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[89] *Ibid.*
[90] *Ibid.*

Published materials from the Commission of Conservation illustrate how widely held, and how similar, the views of sportsmen and wildlife officers were. AFGPA members played a significant role in meetings and forums that developed wildlife policy.

The Commission of Conservation brought Fish and Game managers from across the country together with other natural resource managers and officials and their publications are a useful source of information on the views of wildlife managers during this period. Indeed, Frank Tough stated that such a source is useful for "an understanding of the development of the concept of conservation and the perspectives that conservationists held about Indian use of natural resources."[91]

The Commission of Conservation grew out of the conservation movement that occurred in the US and Canada during the latter part of the nineteenth and early part of the twentieth centuries.[92] Many "eloquent and concerned Americans" began to express their concerns about the "uncontrolled exploitation" by "Robber Barons" which they saw as "the tyranny of mere wealth."[93] John Muir led one school of thought that felt that "large segments of land should be reserved as sanctuaries of nature".[94] This school came to be known as preservationists. They sought to preserve nature in her pristine condition. On the other hand,

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[91] Frank Tough, "Conservation and the Indian: Clifford Sifton's Commission of Conservation, 1910-1919" (1992) 8:1 *Native Studies Review* 62" at 62.
[92] C. Ray Smith and David R. Witty, "Conservation, Resources and Environment: An Exposition and Critical Evaluation of the Commission of Conservation, Canada – Part 1" (1970) 11:1 *Plan* 55.
[93] *Ibid.* at 56.
[94] *Ibid.*

the conservationists, led by Gifford Pinchot, advocated for the "wise use" of land and resources, rather than leaving nature undisturbed. President Theodore Roosevelt assisted the conservation movement by establishing more park and forest reserves and this strong presidential support led to a Governor's Conference on Conservation in 1908 from which evolved the concept of a National Conservation Commission. This was followed by a North American Conservation Conference in 1909 which involved Canadian officials and led to the Laurier government establishing a Canadian equivalent to the American National Conservation Committee.

Canadian Prime Minister, Sir Wilfred Laurier, introduced an *Act to Establish a Commission for the Conservation of Natural Resources* in 1909.[95] This *Act* provided for the creation of a body made up of Federal Ministers as ex-officio members who would answer to their respective Departments of Agriculture, Mines and Interior. Clifford Sifton, a Winnipeg lawyer and Liberal MP, was appointed as Chairman of the Commission. Provincial officials responsible for natural resources made up the Commission's membership as did a "third class of members, appointed by the Governor-in–Council, to include at least one Professor from each Province in which there was a University."[96] However, in practice, "a number of influential federal and provincial politicians and

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[95] *An Act to Establish a Commission for the Conservation of Natural Resources* (1909) 8-9 Edward VII, c.27.

[96] Alan H. Armstrong, "Thomas Adams and the Commission of Conservation" (1959) 1:1 *Plan* 14 at 15.

civil servants, and academics made up the commission" as well as members of "game protection associations, lumber merchants and American wildlife experts attended regularly."[97] The Commission of Conservation was to meet once a year and report to the Governor-in-Council and lay the annual report before both Houses of Parliament.[98] The Commission had a very broad mandate "to deal with all questions related to the conservation and better utilization of natural resources."[99]

This broad mandate and its intrusion into both federal and provincial jurisdictions likely had some part in its ultimate demise. Various committees were set up under the Commission to look at more specific resources or issues. One committee, The Committee on Fisheries, Game and Fur-Bearing Animals, was concerned with "the more efficient utilization of Canada's fish and wildlife resources" which were deemed important for their "commercial value and therefore it was on these practical grounds that the Committee sought to protect and improve Canada's faunal populations."[100]

Many participants of the Commission of Conservation had an interest in conserving game but such conservation of game was generally not for the benefit of First Nations. Regular participants included delegates from the AFGPA and other fish and game clubs with other

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[97] Tough, "Conservation and the Indian", *supra*, note 22, at 61.
[98] Armstrong, *supra*, note 967, at 15.
[99] Smith and Witty, *supra*, note 92, at 62.
[100] Smith and Witty, "Conservation, Resources and Environment: An Exposition and Critical Evaluation of the Commission of Conservation, Canada – Part 2" (1970) 11:3 *Plan* 199 at 205.

invited participants sharing similar views. For example, W.N. Millar, a forestry faculty member at the University of Toronto, presented a paper at the 1915 meeting of the Commission of Conservation's Committee on Fisheries, Game and Fur-Bearing Animals. His paper reflects the attitude of resource managers of the time when he stated:

> **The first animal in importance, from the sportsman's viewpoint, is the Rocky Mountain big-horn. No finer trophy exists in America than the head of the big-horn sheep, and no other animal, with the possible exception of the elk, has been hunted more assiduously or with more disastrous results.**[101]

Millar's information was based on his own "study of the game situation in the Alberta Rockies" and included "the taking of a census of the mountain sheep which, however imperfect it is recognized to be, is nevertheless based upon the very best available knowledge and is at least interesting as an indication of present conditions."[102] This shows that data collected on game populations were not strictly empirical. They generally consisted of information passed on second or third hand by sportsmen of the area.

First Nations rights and needs respecting game in northwestern Canada were dismissed by game officials of the Commission of Conservation as illustrated by Dr. W.T. Hornaday, Director of the New York Zoological Park. While addressing rational game use he immediately thought of the "far north" where the "wild game of the country

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[101] Millar, "The Big Game of the Canadian Rockies: A Practical Method for its Preservation" in Commission of Conservation, Committee on Fisheries, Game and Fur-Bearing Animals, *Conservation of Fish, Birds and Game - Proceedings at a Meeting of the Committee, November 1 and 2, 1915* (Toronto: The Methodist Book and Publishing House, 1916) 100, at 101.

constitutes each year a very important part of the solid food of the white population", but then dismissed First Nations concerns by indicating that it was not his purpose "to enter in detail into a consideration of the needs and the rights of the Eskimo, Indians and wild tribes of that region".[103] Hornaday also stated, with respect to taking and utilizing game, that the western world "contains few fanatics of the oriental type, to whom all killing is abhorrent and wicked. The white races of men believe in the doctrine of legitimate sport and sensible utilization; but the game-hog is a constant menace".[104] Thus, recognition of First Nations interests in game were often easily dismissed as not worthy of discussion, while "legitimate sport" received serious discussion.

Hornaday also spoke of the evils of the sale of game and recommended that the sale of game by Whites or Indians be prohibited outright. He advocated for hunting for food only where necessary and that it should not be "as an industry in competition with the stock-raiser and the butcher."[105] This led to the adoption of a resolution for the Conference to strongly urge all provinces to prohibit the sale of game.[106]

A moral argument for conserving game for the benefit of sportsmen was also made by John B. Burnham, President of the American

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[102] *Ibid.*
[103] Dr. W.T. Hornaday, "The Rational Use of Animals" in the Commission of Conservation, Canada, *National Conference on Conservation of Game, Fur-Bearing Animals and Other Wildlife* (Ottawa: J. de Labroquerie Tache, Printer to the King's Most Excellent Majesty, 1919) 60.
[104] *Ibid.* at 61.
[105] *Ibid.* at 66.

Protective Association at the 1919 conference. He noted that "of the first contingent which Canada sent to war, 75 per cent were sportsmen" who "gave of splendid valor and efficiency" and that if "such men are bred and vitalized by any sport, then it is sacrilege to endanger that sport."[107] According to Burnham, game managers were providing protection of game for the preservation of this sport. He says, "Thank God, the officials who have been responsible for the preservation of the game have been true to their trust."[108] He also states, "Conservation of game is right, but the conservation of sport is righteous."[109] Thus, like most members of sports associations, he feels it is 'righteous' to take the required steps to conserve the 'sport'.

Burnham also advocated the restriction of commercial hunters and argued that game laws without enforcement are useless. Burnham advocates a business approach to game management whereby a game census could be utilized to make rational decisions. In his opinion, "it is a business proposition, this inventorying of resources and it furnishes a business basis for new regulations."[110]

Other papers presented at the conference suggested that the issue of the sale of game was a serious issue for the Commission to address.

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[106] Commission of Conservation, Canada, *National Conference on Conservation of Game, Fur-Bearing Animals and Other Wildlife* (Ottawa: J. de Labroquerie Tache, Printer to the King's Most Excellent Majesty, 1919) at 69.
[107] John B. Burnham, "The War and Game" in Commission of Conservation, Canada, *National Conference on Conservation of Game, Fur-Bearing Animals and Other Wildlife* (Ottawa: J. de Labroquerie Tache, Printer to the King's Most Excellent Majesty, 1919) 95.
[108] *Ibid.* at 96.
[109] *Ibid.*

For example, Frederick Vreeland, member of the Campfire Club of North America from New York, presented a paper to the Committee on Fisheries, Game and Fur-Bearing Animals in November, 1915. While he espoused the prohibition of the sale of game, he thought it rational economic sense to have sportsmen pay big money to secure a trophy head of mountain sheep.[111] He noted the great steps Canada is taking to protect game with the creation of two national parks but cautioned "it must be remembered that the big-horn sheep is the most highly-prized trophy of the sportsman in the North American continent."[112] He favored conserving game for sportsmen:

> Taking a sheep as worth $10 to $15 to a settler for meat, compare that with the figures given you ($1,000) as to the value of that animal, even from a straight business viewpoint, when sought after by visiting sportsmen. The argument is irresistible. These people are not rascals, they simply do not realize the situation; they need education.[113]

He applied the same reasoning to the situation where First Nations hunters take mountain sheep for food. Vreeland opposed food hunting, and argued that it is a thing of the past, except for very remote areas of the far north, and that it contributes greatly to the decrease in game.[114] He also argued for cutting off the market for game and pointed out that many hotels and trains serve wild game on their menus and that railway construction crews and settlers are using much of the game. However,

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[110] *Ibid.* at 98.
[111] Frederick K Vreeland, "Prohibition of the Sale of Game" in Commission of Conservation, Committee on Fisheries, Game and Fur-Bearing Animals, *Conservation of Fish, Birds and Game - Proceedings at a Meeting of the Committee, November 1 and 2, 1915* (Toronto: The Methodist Book and Publishing House, 1916) 93.
[112] *Ibid.*

raising birds and animals in captivity under a license for sale seems okay to Vreeland. According to him, places where game are regulated, the animals maintain their populations and sports hunters can hunt but in areas where people hunt for food, the game is scarce.[115]

F.H.H. Williamson of the Dominion Parks Branch of the Department of the Interior at the 1915 Commission Conference also addressed the issue of game preservation in the Dominion Parks. Parks are maintained as wildlife sanctuaries where "no trap may be set, no gun may be fired" and where "all animals live as free from danger as they did before the advent of man."[116] He stated with respect to the value of wildlife that the "tourist and recreational value of game" are of interest to the Parks Branch. He stated that "tourists delight in observing the wild animals running free in the Parks."[117] Similar to sports hunting arguments, Williamson stated that recreation provided for "the conservation of human efficiency".[118] He continued:

> More than ever after this war we must look forward to building up and maintaining a virile, hardy and intrepid race, and to do this we must not get too far away from primitive conditions of life. The instinct of the hunter is one of the oldest and deepest of the race; there is no stronger lure to the out-of-doors than this.[119]

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[113] *Ibid.* at 94.
[114] *Ibid.*
[115] *Ibid.* at 99.
[116] F.H.H. Williamson, "Game Preservation in Dominion Parks" in Commission of Conservation, Committee on Fisheries, Game and Fur-Bearing Animals, *Conservation of Fish, Birds and Game – Proceedings at a Meeting of the Committee, November 1 and 2, 1915* (Toronto: The Methodist Book and Publishing House, 1916) 125.
[117] *Ibid.* Here we see an example of the broader use of the term "tourist" to mean both trophy hunters and observes of wildlife.
[118] *Ibid.*

Williamson advocated game preserves where animals can replenish their numbers and can "secure a large revenue by the imposition of a small license fee" but also provide for "a natural recreational demand, a demand which should be provided because it tends to make happier and healthier and, therefore, better citizens of our people."[120]

Wildlife, as a tourist resource, is also advocated at the 1910 annual meeting of the Commission by Kelly Evans of Ontario who argued that "our fish and game attract money brought in by tourists" and stays there in the community thereby providing "a peculiar economic advantage to the country that gains it."[121] Thus, another competing interest in game is acknowledged and the commodity of that interest is valued in monetary terms.

Chairman of the Committee on Fisheries, Game and Fur-Bearing Animals, Dr. C.C. Jones, in his opening address at the annual meeting in 1915 stated what a shame it is that such a new country should have such low numbers of wildlife. He acknowledged the jurisdictional issue that the Committee of Conservation regularly encountered by stating "Of course the administration of the game laws is in the hands of the provincial authorities but we are in a position to advise them and to ask them to consider various matters looking towards the protection of

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[119] *Ibid.* at 136.
[120] *Ibid.*
[121] Kelly Evans, "Fish and Game in Ontario" in Commission of Conservation, Canada, *Report of the First Annual Meeting* (Ottawa: The Mortimer Co. Ltd., 1910) 100 at 103.

game."[122] He also spoke of the possibility of "eliminating the market hunter and the marketing of game" and of "increasing our game preserves."[123]

C. Gordon Hewitt, Dominion Entomologist for Canada, was not typical of most members of the Commission because he recognized that some First Nations rely to a great extent on the game. In an article presented to the Commission, while addressing the issue of protection of caribou, he stated "it furnishes the chief material for clothing for the Eskimo and the people in the north country and also, in certain seasons of the year, their chief means of subsistence."[124] Nevertheless, he sought regulation of wildlife. Most other delegates of the Commission were not so sympathetic towards First Nations rights to hunt.

The attitude towards the Stoney First Nations, located west of Calgary, is a case in point. The AFGPA reflected a collective attitude held by many sportsmen that viewed the Stoney First Nations in a very negative light. For example, when the Association learned that the federal government was considering reducing the boundary limits of the national park at Banff, Arthur Wooley Dod, Secretary Treasurer of the

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[122] Dr. C.C. Jones, "Introduction – Chairman's Address" in Commission of Conservation, Canada, Committee on Fisheries, Game and Fur-Bearing Animals, *Conservation of Fish, Birds and Game - Proceedings at a Meeting of the Committee, November 1 and 2, 1915* (Toronto: The Methodist Book and Publishing House, 1916) 100.

[123] *Ibid.*

[124] C. Gordon Hewitt, "Conservation of Birds and Mammals in Canada" in Commission of Conservation, Canada, Committee on Fisheries, Game and Fur-Bearing Animals, *Conservation of Fish, Birds and Game - Proceedings at a Meeting of the Committee, November 1 and 2, 1915* (Toronto: The Methodist Book and Publishing House, 1915) 141 at 147.

AFGPA, presented the Association's views in a letter dated July 19, 1911 to the Minister of the Interior in Ottawa in which he wrote:

> We regret to learn that it is proposed to reduce the limits of the Banff National Park to a great extent, and the Association strongly urges the Department to reconsider the matter, insomuch that if the proposed reduction takes place, the Stoney Indian will exterminate every head of game that is in the country. At the present time this is a breeding ground for all kinds of big game, and if it is thrown open every head will be killed off in one season.[125]

The negative attitude toward the Stoney Indians is evident through much association correspondence and some public materials. An example of the public materials taking an anti-Stoney view is the articles presented at the Commission of Conservation Conferences and were subsequently published. Two articles in the Proceedings of the November 1 and 2, 1915 meeting of the Commission of Conservation Committee on Fisheries, Game and Fur-Bearing Animals, besides arguing that the Stoney Indians are responsible for a large part of the destruction of big game along the Rocky Mountains west of Calgary, also printed pictures of Stoney Indians with numerous heads of Rocky Mountain Sheep.[126] The arguments along with the pictures generally had the effect of inflaming the negative attitudes toward the Stoney Indian hunters. The article by Frederick Vreeland contains a photo of two Stoney First Nations hunters with a few big horn heads in front of them – one holding his rifle and the other with no gun but with a bullet belt strapped around his waist. This image, along with the narrative describing the scarcity of game, invokes a

[125] GA, M1327 Box II File No. 21, typed letter from Arthur Wooley Dod dated July 19,1911 to the Honourable Minister of the Interior, Ottawa.

feeling of contempt for the Stoney hunters as killers of quantities of sheep.

At the annual meeting of the Commission for Conservation in 1913, Mr. Campbell spoke on the Rocky Mountain Forest Reserve whereby he touched on the subtopic of "Indians and Game". He commented on dealing with them and said it is "no easy problem to handle a band of Indians."[127] He raised the question of whether these "Stoney Indians" ought to be allowed to travel north to the "Kootenay Plain" where "they will remain hunting Indians exclusively and will not advance economically as they should" or "whether they should be required to go back on the reserve at Morley and stay there."[128] He noted that the "policy of Canada towards the Indian has been to civilize him and induce him to settle on the land". He argued that to let the Stoney off the reserve would keep them as nomadic hunters and they would "take every opportunity to destroy the game of that district" with the result that "the game would be practically exterminated."[129] The policy of assimilation by keeping First Nations on reserves most of the year along with the seasonal hunting provisions in the game legislation were essentially forms of social control.

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[126] See eg. Millar, *supra*, note 101, at 114. See also Frederick K. Vreeland, *supra*, note 111 at 94.
[127] Commission of Conservation, *Report of the Fourth Annual Meeting* (Toronto: Warwick Bros. & Rutter Limited, 1913) at 38.
[128] *Ibid.*
[129] *Ibid.*

W.N. Millar, of the Faculty of Forestry at the University of Toronto made no effort to understand the Stoney First Nations' unique situation, their dependence upon game or their treaty rights. In his paper presented at the 1915 Commission Conference, he began by reviewing the big game in the Rocky Mountains and noted how important some of these are for the sports hunter, and then delved into a scathing attack on the Stoney First Nations as being the primary reason for the depletion of game stocks.[130] He accused the Stoney of the depletion of game despite categorizing two other "classes" of hunters – transient big game hunters, whom he described as "a minor element" and resident coal miners whom he described as "a much more difficult class", "mostly Europeans with no very great respect for the law". He described the Stoney as "a tribe of from 400 to 600 individuals living practically in an aboriginal state" who rely on game as their main source of food supply, and no "restrictions have ever been placed upon them in the matter of hunting at will."[131]

Millar's inflammatory language reflected the sportsman's attitude toward the Stoney. The Stoney were viewed as competition for the game resources. He stated, "Unquestionably, therefore, there can be no hope entertained for the Rocky Mountain big game until these Indians are compelled to observe the game laws".[132] He also noted that the Stoney have had their activities "curbed" by the creation of the parks and that

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[130] Millar, *supra*, note 101.
[131] *Ibid.* 112.
[132] *Ibid.* 114.

they were "driven out" of the south country near Crowsnest Pass by game warden Frenchie Riviere.[133] However, it seems unlikely that Frenchie Riviere would drive the Stoney out of anywhere, except for a Park, since as was discussed above, he was a very good and sympathetic friend of the Stoney people.[134]

Millar's inflammatory language fosters dislike of the Stoney. This is illustrated by his description of Stoney as a "menace to the big game of the Rockies."[135] He also made some extravagant claims about the numbers of animals taken by the Stoney. He stated that the average daily consumption was about 2 ½ pounds per person extended to the entire tribe of between 400 and 600 persons equated to about 3,500 head of game per annum and not less than 2000 head of which about one third would be sheep. Yet he told of having visited 8 Stoney camps in 1913 and finding "nearly 100 head of sheep" in addition to "numerous deer."[136] What this illustrates is that in eight different hunting camps he saw numerous heads, perhaps about a dozen per camp. Nevertheless, Millar is disgusted with their method of hunting which included sometimes using dogs or driving animals into blinds and sometimes taking ewes and lambs. Millar saw these game animals only as potential trophies. He took neither the time nor the energy to try to understand that the Stoney depended on these animals for their livelihood. In order

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[133] *Ibid.*
[134] See discussion above at page 52 of Mr. Riviere's sympathy for First Nations people.
[135] *Ibid.* 113

to survive, they had to hunt. Furthermore, they were promised at the Treaty 7 negotiations that they could continue to hunt as before.

The position of Alberta sportsmen regarding the Stoney as responsible for the depletion of game was taken up and advocated by the delegates of the Commission of Conservation. The point they were trying to convey was that the Stoney were responsible for the "wanton destruction" of game; game which of course they wanted for their sport hunting. Since sportsmen and game officials often attended the same meetings, such negative information on the Stoney was disseminated widely amongst their members and those with which they came in contact. This example of the negative attitudes towards First Nations hunters provided the backdrop for provincial pressure to bring First Nations hunters under the provincial game regulations.

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[136] *Ibid.*

Chapter 4

Influence of Sport Hunting Values on the Jurisdictional Debate and Dominion Policy

I have argued above that sport hunting values were promoted throughout provincial game regulations and its enforcement. For example, the codes of fair play and concepts of illegal shooting were incorporated into the wildlife legislation and exercised through the enforcement policy were written into territorial and provincial law.[1] There was a close link between the sportsmen and the legislators. The sportsmen had a powerful lobby that influenced provincial legislation and its enforcement and also played a role in national fish and game conferences. Game guardians and provincial wildlife managers, as the government's enforcement agents, were generally sports hunters and therefore had a vested interest. The sport lobby, provincial legislators and those implementing the regulations were also influenced by the sport lobby.

In this section, I discuss the influence of jurisdictional debates and demands for increased provincial government control upon federal policy formulation and the delegation of powers over First Nations hunting. I also elaborate on federal consideration of First Nation rights, the influence of sport interests on Dominion officials and the favored position

[1] For an argument that sportsmen played a role in the development of a code of fair play, see Thomas L. Altherr, "The American Hunter-Naturalist and the Development of the Code of Sportsmenship" (1978) 5 *Journal of Sport History* 7.

of sport hunters. I do this by examining Department of Indian Affairs correspondence.[2]

4.1 Pre-1930 Jurisdictional Debate

The jurisdictional debate before 1930 had provincial and local territorial legislatures seeking more control over local matters; including natural resources. The North West Territories government sought the same jurisdictional power held by the provinces at Confederation to be as close to the position as the provinces and also wanted the revenues from natural resources to finance their government. Thus, the territorial legislatures, like the provinces, sought to exercise jurisdiction over game animals.

Under the *BNA Act, 1867*, the Dominion Government had exclusive jurisdiction over "Indians and lands reserved for Indians" pursuant to s. 91(24). The original provinces retained their ownership and jurisdiction over lands and natural resources pursuant to ss. 109 and 117 of the *BNA Act, 1867*. With respect to western Canada, after the purchase of Rupert's Land, the federal government retained ownership and jurisdiction over the lands and natural resources of the North West Territories and the newly created postage stamp sized province, Manitoba. Thus, these areas, especially after 1905 when the provinces of Alberta and Saskatchewan vehemently protested the Dominion

[2] NAC, RG 10, Vols. 420-1, 420-2 and 420-2A.

Government about not having ownership and control over the Crown lands and natural resources. Thus, as discussed above, the territorial legislature passed game regulations, which applied to white hunters. The Dominion also had its own game legislation. Such legislation was disallowed by the federal government if it attempted to regulate First Nations hunting. Exclusive jurisdiction over Indians was set out in the constitution but also was set out in the treaties. The First Nations leaders negotiated with the federal Crown representatives and understood that their treaty rights to continue their livelihood would be protected. They understood that only such laws made from time to time by the "Government of the country" would be made by the federal government and only when in their interests and necessary for conservation of the game. Thus, when the Dominion Government acquiesced and drafted s. 133 of the *Indian Act* to allow for the delegation of powers to the territorial and provincial governments, they were essentially abrogating their constitutional obligation to look out for the interests of their First Nations beneficiaries. In other words, they breached their fiduciary-like duties.[3] Arguably, again with s. 12 of the *NRTA* the federal Crown is in breach of its duties to First Nations with the infringements on their ability to carry on their traditional livelihood rights promised in the treaties.

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[3] See generally Leonard Ian Rotman, *Parallell Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996) and Michael J. Bryant, "Crown-Aboriginal Relationships in Canada: The Phantom of Fiduciary Law" (1993) 27 *U.B.C.L.Rev.* 19.

Jurisdiction was certainly an issue during this period. The province's jurisdiction over natural resources was relatively clear. This jurisdiction also extended to control over wildlife. Indeed, provincial hunting legislation was upheld for Manitoba in the 1886 decision of *Robertson*[4].

The application of territorial and provincial game regulations upon First Nations hunters became a serious concern by the late 1880s and early 1900s. Officials in both provincial and federal levels began to view provincial governments as having jurisdiction over game. However, they did not agree on whether this jurisdiction extended to Indians hunting on reserve lands. They also seemed to be viewing the Territorial Legislature as a quasi-province as far as legislating over wildlife was concerned. Many, especially at the territorial and provincial level, felt such laws would apply to Indians who hunted off their reserve. This opinion is revealed in a letter written about 1910 found in Department of Indian Affairs files which states a provincial Legislature can make laws:

> as it seems to it proper for the preservation of game within the province, and that such provisions if in terms sufficiently general, would extend and apply to Indians, unless and except in so far as Indians were expressly or impliedly exempted from them; that such laws passed by the Legislature and not disallowed would be valid and binding, even if they operated to deprive the Indians of rights assured to them by treaty...[5]

Such opinions were evidence of uncertainty respecting jurisdiction over Indian hunting. The ambiguity surrounding the validity of provincial

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[4] *R. v. Robertson* (1886) 3 Man. R. 613 (C.A.)
[5] NAC, RG 10, Vol. 6731, file 420-1, typed letter, author unknown, no date.

game laws which breached the treaty rights of Indians is also illustrated by the qualifying phrase which followed the above quote, "but that so far as any provision of such a law was clearly contrary to the provisions of a treaty it might well be held to be an improper and unjustifiable exercise of the legislative power."[6] The author of the letter also argues that even if Indians have the "restricted right to take game" and are not subject to provincial game laws, "it would probably be incumbent upon the Dominion Government to place some restrictions on the taking of game in order that the privileges referred to in the above stipulation might be preserved to the Indians."[7] The "privileges" this author refers to are the treaty hunting rights of First Nations. Thus, even though it was not entirely clear how far the provincial laws could extend to restrict First Nations hunters, it was felt that First Nations hunters ought to be regulated to the extent that this supported provincial power. The conservation of game for First Nations was a factor considered at the time, but it seems clear federal officials believed that only the Dominion Government had the jurisdiction to enact conservation measures affecting them. Indeed, L. Vankoughnet, Deputy Superintendent General of Indian Affairs, stated as early as 1893 that the territorial legislatures could not bring First Nations within its game legislation and that "in the face of Treaties relating to the right of hunting, it was clear that only the

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[6] *Ibid.*
[7] *Ibid.*

Dominion Government had the power to do so."[8] It seemed clear that the federal government had jurisdiction over First Nations, and that Treaties overrode provincial or territorial game laws.

However, this did not deter provincial and territorial governments from seeking to have their game laws extend to First Nations. Through their own pressure and the sportsmen's lobby discussed earlier, the Dominion government amended the *Indian Act* to allow the delegation of powers over Indian hunting to the provincial or territorial governments. Through s. 133 of the *Indian Act*, any First Nations identified in a public notice issued by the Superintendent General of Indian Affairs were subject to the provincial game laws from the date of the notice.[9] Once certain First Nations were proclaimed to be subject to the provincial or territorial game laws, those game laws applied to First Nations hunting off reserve. However, they did not "apply to Indians within the limits of their reserves with respect to any animals or birds killed at any period of the year for their own use for food only and not for purposes of sale and traffic."[10] Thus, although the provinces knew First Nations reserves were outside their jurisdiction, they still lobbied to have their game laws

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[8] NAC, RG 10, Vol. 6731, file 420-2, typed memorandum from L. Vankougnet, Deputy Superintendent General of Indian Affairs, dated February 18, 1893, addressed to the Honourable T. Mayne Daly, Superintendent General of Indian Affairs and Minister of the Interior.

[9] Section 133, *An Act further to amend "The Indian Act", chapter forty-three of the Revised Statutes* (1890) 53 Victoria. c. 29, s. 10., as well as the discussion below.

[10] NAC, RG 10, Vol. 6731, file 420-1, typed letter, author unknown, no date, circa, 1903.

extend to First Nations on reserves, at least for the purpose of restricting the barter or trade of game animals.[11]

Frank Pedley, Deputy Superintendent General of Indian Affairs in 1907 tried to counter First Nations' concerns about the application of provincial laws through s. 133 declaration by stating, "the legislature there has no power to make laws for the Indians although a few of their laws for the whole province may affect the Indians, such as game laws, but they cannot go on your Reserve and make laws for you there nor tax your property."[12] Pedley's statements evidence a departmental understanding of the division of powers whereby the provinces have jurisdiction over game within their borders, while the federal government retains jurisdiction over First Nations and reserve lands.

The policy of the Department of Indian Affairs regarding provincial game laws and Indian hunting rights was to advise the Indians that regulations were in the best interests of the Indians and to request that the provincial Government "make reasonable concessions to the Indians when special circumstances seem to warrant the same."[13] Such concessions had already been made by the Ontario government in their game legislation which provided that the Lieutenant Governor in Council could make regulations exempting Indians in the north or northwest

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[11] NAC, RG 10, Vol. 6732, file 420-2, copy of pages from Waghorn's Guide, at 154 under heading "Close Season for Game – Manitoba".

[12] NAC, RG 10, Vol. 6732, file 420-2, typed letter from Frank Pedley, Deputy Superintendent General of Indian Affairs, Ottawa dated April 27, 1907 addressed to Chiefs and councilors, Stony Reserve, Morley, Alta.

parts of Ontario.[14] Reference to this exemption provided an example for the Dominion Government to refer to in trying to convince the prairie provinces to exempt First Nations hunters from the provincial game laws.

It was generally recognized by the early 1900s, prior to the creation of Alberta, that provinces could not directly legislate over First Nations, but rather only have laws of general application that might indirectly affect them. For example, a game law, which applied generally to everyone, might therefore also apply to First Nations hunters.[15] Hence, reference to 'Indians' in provincial game legislation was limited. For example, British Columbia's game legislation provided that their game provisions would not apply to Indians except on game preserves or if a provincial order-in-council has declared a closed season for birds or animals.[16] The B.C. Act also provided for the Lieutenant Governor in Council to "exempt Indians and persons in the habit of dealing with Indians, in the northern and north easterly portion of the province from any of the provisions of the Act which may be specified in such order."[17] This quote was referring to any order-in-council made by the Government of the province. Saskatchewan's game legislation provided that their game provisions applied only to Indians if it were declared applicable by the Superintendent of Indian Affairs under the *Indian Act*.

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[13] *Supra*, note 8.
[14] *Ibid.*
[15] See discussion above at pages 5 and 6 of this study.
[16] Referred to in letter, *supra*, note 5.
[17] *Ibid.*

The *Alberta Game Act* did not have any special provisions dealing with Indians. However, it recognized that the Lieutenant Governor could refund the amount paid for any hunting license to any Treaty Indian. This required a certificate from the Indian Agent declaring the person to be a Treaty Indian on the reserve under his control.[18] Thus, despite the attempts and growing pressures of the local legislatures to extend their game laws to First Nations, there continued to be recognition of the limitation of the scope of provincial game laws with respect to reserve lands as well as some recognition of First Nations special rights to game.

4.2 Recognition of First Nations Interests

As discussed earlier, hunting was of great economic and cultural significance to First Nations.[19] They were vehement in their position with Crown representatives in the treaty negotiations to preserve their traditional livelihoods. Treaty Commissioners gave them assurances that they would be allowed to continue and would only have restrictions placed upon them that were to preserve the game for their benefit.[20] All but two of the numbered treaties expressly reserved the hunting rights of First Nations. The Dominion Government also had a fiduciary-like responsibility to look out for the interests of First Nations pursuant to

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[18] *Ibid.*
[19] Chapter 2.1 of this study.

the treaty and their jurisdiction over 'Indians and Lands Reserved for Indians' under s. 91(24) of the *BNA Act*.[21]

At the outset, the Dominion Government acknowledged special treaty rights to hunt in First Nations. The Department of Justice corresponded with the Department of Indian Affairs on various issues relating to these rights. For example, in 1890, the Department of Justice advised the Dominion Government to consider disallowing application of a territorial law as indicated in the following:

> **Attention called to fact that N.W.T. Game Ordinance amended at last assembly by striking out Section 16 which exempted Indians from its operation - This ordinance without consent of Government of Canada or of Indians secured by treaties. This Department considering advisability of advising His Excellency to disallow ordinance.**[22]

The Department of Justice was of the opinion that First Nations hunting for food or necessities of life were not subject to provincial game laws because of s.91(24) and their treaty rights.[23]

With respect to treaty rights in the context of fishing, the Department of Justice concluded in 1898 that:

> **Such regulations if *intra vires* of Parliament or of the Governor in Council as applied to others are *intra vires* also as applied to Indians notwithstanding that they may restrict the exercise of rights claimed by them under treaty - Treaties do not as a matter of law limit the**

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[20] *Treaty No. 8 and Adhesions, Reports, Etc.* (Ottawa: Indian Affairs and Northern Development and Queen's Printer, 1966), at 6. See also discussion in Chapter 1, page 11, of this study.

[21] Section 91(24) of the *BNA Act, 1867* [now called the *Constitution Act, 1867*] gave exclusive jurisdiction over "Indians and lands reserved for Indians" to the federal government and the treaties had the proviso in the hunting clause for the federal government to make laws from time to time for the benefit of the Indians and for conservation. For an excellent discussion of the historical and jurisprudential basis of the fiduciary duty owed by the federal Crown to First Nations, see Leonard Ian Rotman, *Parallel Paths*, *supra*, note 3.

[22] *Supra*, note 5.

[23] *Ibid.*

> **power of Parliament to impose regulations otherwise within its jurisdiction governing the exercise of such rights.[24]**

This suggests that the Department of Justice believed only the federal government had the authority to override treaties made with First Nations. The doctrine of parliamentary supremacy saw Parliament as supreme and able to override treaties and the Department of Indian Affairs was clearly aware of this.[25] In 1889, Indian Commissioner Hayter Reed was also convinced that provincial and territorial game laws could not override the treaty rights of First Nations to hunt but that "it is clear that only the Dominion Government has the power to do so."[26]

The Department of Indian Affairs was aware of the importance of game as a food source for First Nations. Indian Affairs was consulted by the Department of the Interior to obtain their opinion on "whether the Indians are so entirely dependent upon beaver as to render it possible or prudent to make it unlawful for them to kill beaver at all or to trade or sell their skins."[27] David Laird, Indian Commissioner, responded in a letter to the Secretary of Indian Affairs that, "the Indians of Treaty No. 8 were promised at the making of the Treaty last year that they would not

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[24] *Ibid.*

[25] Parliamentary supremacy is the notion that Parliament is fully sovereign and can legislate at will, including riding over individual rights of its citizens or the collective rights of various groups such as First Nations Aboriginal and treaty rights. Justices Lamer and LaForest stated in Sparrow at 177 that "there was from the outset never any doubt that the sovereignty and legislative power ... vested in the Crown." See eg. George Winterton, "The British Grundnorm: Parliamentary Supremacy Re-examined" (1976) 92 *Law Quarterly Review* 591 and for the Canadian context see J.R. Mallory, "The Courts and the Sovereignty of the Canadian Parliament" (1994) 10 *Canadian Journal of Economics and Political Science* 165.

be interfered with in their hunting until settlers came into the country" and suggested that there should be no prohibition of First Nations trapping beaver.[28]

Laird also received a letter from Commissioner C.C. Chipman of the Hudson's Bay Company in Winnipeg that stated that Whites in the area "are of opinion that it would be almost altogether useless to attempt to enforce a 'Close Season' for Beaver" because the beaver in many cases are "the principle article of food".[29] Second, the First Nations hunters would want to trade the skins and there was a danger that unscrupulous traders would buy them.[30] Both Indian Commissioner Laird and Hudson's Bay Company Commissioner C.C. Chipman believed that if regulations were to be made restricting First Nations from trapping beaver, the treaty required that regulations be for the advantage of the First Nations and that hunting for food could not be curtailed without the risk of starvation for First Nations.

The above correspondence indicates that Indian Affairs senior officials knew that First Nations had important interests in game and hunting that needed to be considered and respected by virtue of their treaty rights. They were also aware of the food and economic reliance of

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[26] NAC, RG 10, Vol. 6732, file 420-2, hand written letter from Hayter Reed, Indian Commissioner, dated November 25, 1889, addressed to the Deputy Superintendent General of Indian Affairs in Ottawa.
[27] *Ibid.*
[28] NAC, RG 10, Vol. 6732, file 420-2, type written letter from David Laird, Indian Commissioner, Winnipeg dated May 9, 1900 addressed to the Secretary, Department of Indian Affairs, Ottawa.
[29] NAC, RG 10, Vol. 6732, file 420-2, type written letter from C.C. Chipman, Commissioner, Hudson's Bay Company, Commissioner's Office, Winnipeg dated October 5, 1900 addressed to the Hon. David Laird, Indian Commissioner, Winnipeg.

Indians on hunting while they deliberated these matters regarding the application of game laws to First Nations.

The Department was also supported in recognition of special hunting rights for Indians by some members of the public. One example is Bishop Richard Young of the Athabasca district. He was quoted in the *Winnipeg Free Press* [31] in Spring 1894 advocating First Nations interests in the north. Bishop Young stated, "keep the Indians satisfied by restricting their use to certain guns" and "killing of big game by white hunters must stop" and "action must be taken to stop the reckless destruction of timber by fires."[32] The reporter also notes the Bishop was concerned that "Indians have no 'Treaty' and of course are dependent upon game and furs for their subsistence."[33] In a letter to the editor of the *Winnipeg Free Press*, published May 14, 1894, Bishop Young pointed out misstatements made by the reporter.[34] He clarified that the 'Indians' in the north are quiet and peaceable but they had the potential to become unruly should anyone try to restrict their hunting and that any action taken by government to regulate white hunters to protect the game would be difficult to enforce on the First Nations. Another example of advocacy is Reverend H. Grandin of Edmonton. In 1907 he wrote to

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[30] *Ibid.*

[31] NAC, RG 10, Vol. 6732, file 420-2, newspaper article entitled "Protection Up North: The Bishop in Athabasca on Need for Reforms" in the *Winnipeg Free Press*, no author, no date, circa early May, 1894.

[32] *Ibid.*

[33] There was no treaty in Northern Alberta until June, 1899. See generally Richard Daniel, *supra*, note 48.

[34] NAC, RG 10, Vol. 6732, file 420-2, letter to the editor by "Richard Athabasca" [Bishop Richard Young of Athabasca] entitled "Concerning Athabasca" in the *Winnipeg Free Press*, May 14, 1894.

Frank Oliver, Minister of the Interior and Superintendent General of Indian Affairs "on behalf of the Indians to ask you to take steps to ensure the enforcement of the law prohibiting the use of poison for killing furs."[35] He complained about a "few white men" who had "done much harm" and the "well known fact that white hunters kill for the sake of the skin only" and that they "left the whole carcass" to rot.[36]

On occasion, the courts also recognized the right of First Nations. This is reflected in an 1889 Department of Justice opinion letter which explains that "a conviction against [an] Indian [was] quashed and that the Judge commented severely on the conduct of the Magistrate who convicted the Treaty Indian, and directed that his conduct should be reported to the Local Government."[37] Also, in 1910, the *Stoney Joe*[38] case was decided by the appeal court in Alberta. It held that despite a proclamation by the Superintendent General of Indian Affairs naming the Stoney First Nations to be subject to the territorial or provincial laws, any later amendments to such laws did not of themselves apply to the Stoney First Nations without further declaration. Justice Stuart reasoned that although the Dominion Government could delegate its powers to regulate Indian hunting, this delegation did not go so far as to

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[35] NAC, RG 10, Vol. 6732, file 420-2, typed letter from H. Grandin, Edmonton dated October 10, 1907 addressed to Honourable F. Oliver, Minister of the Interior, Ottawa.
[36] *Ibid.*
[37] *Supra*, note 5.
[38] *Rex. vs. Stoney Joe, Judgment of Justice Stuart*, unreported decision contained in NAC, RG 10, Vol. 6732, file 420-2A. This judgement was eventually published by the Native Law Centre at the University of Saskatchewan in [1981] 1 C.N.L.R. 117.

allow all future amendments to provincial game acts to apply on their own. He concluded that Parliament or its delegated official, the Superintendent General of Indian Affairs, had a legal obligation to review any existing law to consider its contents and its merits before making amendments applicable to Indians. Thus, even with a delegation of powers, the federal government retains an important role in ensuring First Nations rights and interests are protected.

In 1915, Supreme Court of British Columbia held in *R. v. Jim* that the provincial game laws did not apply to an Indian who killed a deer on the reserve.[39] Hunter C.J.B.C. reasoned that s. 91(24) of the *BNA Act, 1867* gave exclusive jurisdiction to the Dominion Parliament, which exercised its jurisdiction by enacting the Indian Act that contains many provisions regarding the management of Indians upon their reserve. Hunter C.J.B.C. concluded by stating "Obviously the proper course for the local authorities is not to attempt to pass legislation affecting the hunting by Indians on their reserves or to apply general legislation regarding game to such Indians, but if necessary to apply to the proper law-making authority and make any representations that they may see fit."[40]

Despite this recognition of First Nations' interest in game resources and treaty rights to hunt, there was a growing pressure within the

[39] *R. v. Jim* [1911-1930] 4 C.N.L.C. 328
[40] *Ibid.* at 330.

provinces and against the Dominion government to bring First Nations hunters under the game laws.

4.3 Influence of the Sports Lobby

As indicated earlier, pressure groups were lobbying the provinces and other officials at this time. Petitions were sent to the Minister of the Interior in early 1893 by various Rod and Gun Clubs in Western Canada lobbying for the *North West Territories Game Ordinance* to apply equally to First Nations.[41] Rod and Gun clubs from Calgary, Lethbridge, Edmonton, Red Deer, McLeod, Maple Creek, and Moose Jaw sent in petitions with their membership lists attached.[42] The Petition stated that the purpose of their respective clubs was "for the encouragement of sport with gun and rod" and "the protection of game."[43] The Gun Clubs indicated concerns about the decline in wildlife, "particularly in the case of prairie chicken and wild fowl."[44] The thrust of the Petition, however, is on First Nations hunters and game laws. For example, clause three of the Petition they state that the closed seasons provided for provincial law in the Ordinances "are generally carefully observed by white men" with

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[41] NAC, RG 10, Vol. 6732, file 420-2, see for example, typed Petition from the Calgary Rod and Gun Club dated February 3, 1893, addressed to the Minister of the Interior and the Superintendent of Indian Affairs.

[42] The list from Maple Creek had 19 names; the list from Edmonton had 29 names; the list from Calgary had 74 names; the list from Lethbridge had 11 names; other lists which are difficult to tell which sportsmen association they belong to but were also sent with these petitions include one with 45 names; and one with 19 names; another with 65 names.

[43] *Ibid.*

the enforcement of those provisions carried out by the gun clubs.[45] It is interesting to note that the two game birds noted as being in decline are those hunted most by sports hunters.

The Gun Clubs go on to argue that "the efforts of your petitioners and the objects of the game laws, are practically nullified and defeated owing to the fact that these laws are held not binding on the Indians, who not only take innumerable eggs of the wild fowl and chicken, but slaughter thousands of young birds before they are able to fly."[46] The clubs feared the result would be the depletion of game birds in a short period, which would be "deplorable to the country at large as to sportsmen in particular."[47]

Although the Rod and Gun Clubs had concerns about the preservation of game, their primary concern was that sportsmen might be deprived of their opportunity to practice their blood-sport. Acknowledging the actions taken by the provinces in other parts of the Dominion to prohibit the killing of game "to show the importance of dealing with this matter with a firm hand" while there is still a quantity of game left.[48] These clubs were obviously aware of treaty rights to hunt. This is evident in statements in the petition such as: "While your petitioners do not wish to interfere with any treaty rights of the Indians,

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[44] *Ibid.*
[45] *Ibid.* clause 3. Although there is some validity to this statement, there are many examples of sportsmen and farmers who did not follow the regulations.
[46] *Ibid.* clause 3.
[47] *Ibid.*

they wish to impress upon the Honorable Minister the imperative necessity of placing the Indians, so far as possible, on the same footing as white men, in respect to game laws."[49] If the Minister is unwilling or unable to bring First Nations hunters under the same laws as white hunters, they suggest alternative measures be taken such as "the Indians being strictly confined to their several reservations during the breeding season."[50] The idea was to impose administrative limitations where legal ones might not be available.

The Petition also makes a case for reducing animosity among Whites by introducing legislation to bring First Nations hunters under the game laws:

> Your Petitioners are further of [the] opinion that the practical subjection of the Indians to the game laws would tend to allay the irritation that naturally exists among settlers and sportsmen, owing to the utter disregard by the Indians of these laws, that settlers and sportsmen themselves are obliged to observe and respect.[51]

The Gun Clubs also "pray; That such legislation may be introduced into the Dominion Parliament, as will most effectually carry out the object your Petitioners have in view" and also ask that the Indian agents prevent First Nations hunters from leaving their reserves during the breeding season.[52] Soon after the petitions made their way to the

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[48] *Ibid.*
[49] *Ibid.*
[50] *Ibid.*
[51] *Ibid.* clause 5.
[52] *Ibid.* It is ironic that the members of the Gun Clubs who so forcefully invoke classical liberal notions of equality for all people can seek to restrict the freedom of First Nations persons to their reserves during closed season. It does not appear that Gun Clubs see any contradiction.

Department of Indian Affairs, the Stoney First Nations were brought under territorial game laws.

Lobbying by sportsmen was also carried out on an individual basis. One example is contained in correspondence from an American sportsman, Madison Grant, who was also a member of the New York Zoological Society. Grant complained to Clifford Sifton, Minister of the Interior in 1903 that when he was hunting near Golden, B.C., he found that "the Stony [sic] Indians were doing some extremely destructive hunting for Big Horn" along the eastern Rocky Mountains.[53] He claimed that they were "killing these animals for their heads, which [are] sold to tourists" and that there was "quite a demand for them."[54] Grant also claimed that some Kootenay Indians were hunting in the upper Kootenay valley "and this [would] probably mean the extermination of moose" in an area where they still remained and that the presence of Shuswap Indians at "one of the very few places left where this rare caribou [was] to be found" is a "disaster."[55] He also reported that two Shuswap Indians near his camp killed six goats, chiefly females and young, in "a three days' hunt for meat." [56]

The taking of six big game animals over three days by two First Nations hunters is not that alarming. Not everyone in the Band would be

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[53] NAC, RG 10, Vol. 6732, file 420-2, typed letter from Madison Grant, Secretary of the New York Zoological Society dated December 2, 1903 addressed to Hon. Clifford Sifton, Minister of the Interior, Ottawa, Canada.
[54] *Ibid.*
[55] *Ibid.*

hunters. Thus, there is a reliance on the hunters to kill enough to feed themselves, their families, and provide for those who do not hunt. Six animals divided between the extended families of two hunters would not go that far. Some meat would be smoked and dried for later consumption. If there was a surplus, they would have the option to trade or barter some of it for other necessaries. However, because of the conflicting value placed upon game by sportsmen and First Nations, any quantity taken by one party would be viewed by the other as detrimental to its interests.

The American sportsman, Grant, also complained that "white settlers" in the Columbia Valley were "an orderly and law abiding class" who would willingly co-operate to protect game, but that "the law is not applied alike to indians and whites."[57] He claimed that these Indians hunted on horseback and in a crowd with dogs, generally making a clean sweep of the area, "killing everything they [saw]."[58] The claims have no sources listed, so one may assume he either witnessed this first hand or heard it second or third hand. He likely discussed the matter with the local sportsmen as he refers to the white settlers who feel they are not being treated equally with the First Nations hunters. Grant asked Minister Sifton whether his department might "do something to keep these Indians on their reservations" or work with the provincial

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[56] *Ibid.*
[57] *Ibid.*
[58] *Ibid.*

authorities to protect the game "from needless slaughter."[59] Ironically, the American sportsman, like his Canadian counterparts, saw First Nations hunting in quantity as "needless slaughter" while overlooking the sport of killing or killing for trophies was as much a "needless slaughter" given that the First Nations were needful of game for food and commerce.

Another striking example of the sports lobby is a letter written by Philip A. Moore, a sportsman from Banff, addressed to Hon. Frank Oliver in May 1905 to discuss the necessity of "restraining the Indians from game slaughter" and preserving game from the "wholesale destruction that is going on at present."[60] While conceding that most game laws seemed to "reach the root of the evil", he felt that they were "aimed at the tourist as an all destroying engine of extermination" so he wanted to give "a few facts" to clarify the situation as he felt sure he "knew every side of the question & look[ed] at it in every light & [could] prove everything."[61] Moore argued that the average tourist was inexperienced in climbing mountains and had only a short time to spend in the country, yet "owing to the rapid extermination of game by the Indians" the tourist had farther to go to a place where he would have a "reasonable chance of getting a head."[62] For the average tourist, a head "must be what the name implies – a trophy worthy of being hung up & admired – or else his trip is a

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[59] *Ibid.*
[60] NAC, RG 10, Vol. 6732, file 420-2, typed letter from Philip A. Moore, Banff, Alberta dated May 25, 1905 addressed to the Hon. Frank Oliver, Ottawa.
[61] *Ibid.*
[62] *Ibid.*

failure".[63] Moore also argued that tourists employ "a great number of men & bring a great deal of money into the country" and since there were only about fifty heads brought into Banff by sportsmen, it is not good for business.[64] He clearly equates the tourist with the trophy hunter. It is interesting to note that if, as Moore claims, "only 50 trophy heads" were taken by sports hunters in one season, then it is likely that sports hunters had been taking considerably more each season. However, sportsmen rarely felt that trophy hunting contributed to the decline of big game populations.

Moore, like most sportsmen, placed the depletion of big game squarely on the shoulders of First Nations hunters and quite matter of factly dismissed any blame on sport hunters. He stated hunting guides "realize the importance of preserving the game" since their living depends upon it and argued that a "man accustomed to the mountains is not inclined to slaughter the game."[65] He gave the example of a free miner's license, which permitted the miner to kill game in and out of season, but also states "to [his] knowledge this right has not been abused.[66] He also dismissed an assertion by many people that trappers sometimes bait their traps with meat from mountain sheep or goat because it is too difficult to pack meat up or down mountains. In his opinion there would be "no money in trapping for a whiteman when trapping in this

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[63] *Ibid.*
[64] *Ibid.* Here we see clearly that Moore, a sportsman, uses the term "tourists" to mean trophy hunters.
[65] *Ibid.*

manner."[67] He also noted, "we have the absolute facts & examples here in Banff" an area in which " it is neither the tourist nor the guide who is the cause of the rapid decrease of game."[68] Rather, according to him, the real cause is "the Indian."[69]

Moore stated that his conclusions were based on his "many years experience & observation among the Indians & from hunting with them" and that "One has to know the Indian intimately before he can understand him."[70] This statement is ironic since it appears he has little understanding of First Nations' interests in game and their treaty rights to hunt. Moore boldly stated that the "Kootenais [sic] and Stoneys are the Chief causes of game extermination – the latter especially."[71] He estimated the Stoneys taking 10 animals per hunter "and there are over a hundred hunting."[72] He stated he knew one Stoney hunter who killed 36 sheep in one day. Moore also stated that the Stoneys make no distinction between lambs, ewes and rams and shoot porcupines, rabbits and squirrels "as soon as they see them."[73]

To Moore this indicated that the Stoneys kill for food (and/or commerce) rather than for sport. Shooting ewes mean that trophy heads are not the determining factor in a Stoney hunter's choice of animal.

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[66] *Ibid.*
[67] *Ibid.*
[68] *Ibid.*
[69] *Ibid.* Emphasis in the original.
[70] *Ibid.*
[71] *Ibid.*
[72] *Ibid.*
[73] *Ibid.*

Consequently, Moore argued that the law prohibiting the sale of mountain sheep heads "does not get at the root of the evil" since he claimed most of the animals are taken "by the Indians" and "the head of the ram rots on the top of some mountain after it is shot for it is against the law to bring it in."[74]

To make his point, Moore complained that the Stoney are "incomparable hunters" who are "patient & tireless", who "seldom miss a shot" and who track so well that a track "never escapes them."[75] He did not hesitate to exaggerate his claims to make his point. They can even "follow a trail over the bare rock."[76] He also claimed that the Stoneys "clean the country like a rake" by surrounding a mountain and driving everything to the top and kill the animals there, and stated that no animal escaped.[77] Moore claimed to have seen the bones of many hundred animals around the Stoney hunting camps. The bones he observed could be explained by an exaggerated count or by the fact the Stoney use the same hunting camps on many occasions. However, like many sport hunters, Moore did not care to understand why the Stoneys took quantities of game.

Moore, represented the sportsmen's goals of this era, with his call for a change in the laws and strict enforcement of the laws in order to protect game that is quickly dwindling in numbers. Although Moore

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[74] *Ibid.*
[75] *Ibid.*
[76] *Ibid.*

stated he "cannot blame the Indians for they never consider the morrow" and it is "their nature to be as they are", he nevertheless blamed them for the "slaughter", "extermination" and "massacre" of game.[78] The use of such inflammatory words to describe Stoney hunting is not surprising since Moore reflected a widely held attitude of sports hunters and he readily admitted that he was not "an admirer of the Indian in any sense of the word" although he did admit they "ought to have fair play" since "they owned the land in the first place."[79]

Sportsmen also used the press as a tool in their lobbying efforts. For example, The Vancouver *Daily Province* ran an article in which Mr. J.H. Brewster of Banff stated many of the same arguments made by Philip A. Moore. He included the fact that the Government might have to spend more on rations for the Stoney in order to keep them restricted to their reserves during close season.[80] Brewster argued that the Stoneys basically slaughter the mountain big game animals anywhere they hunt, while the tourists (sportsmen) bring in revenue. Although he stated "The Indian is a necessary evil, and as such we must provide for him", he acknowledged that "if we take away from him the freedom of the mountains, we must repay him in some way, and the least we can do is to supply him with rations, and more especially since we gain so much

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[77] *Ibid.*
[78] *Ibid.*
[79] *Ibid.*
[80] NAC, RG 10, Vol. 6732, file 420-2, newspaper clipping, "Indian Hunters Killing Off Game" in the *Daily Province*, Vancouver, B.C. Saturday, February 24, 1906.

more in return."[81] This was a very base understanding of Aboriginal rights based upon prior occupation. It was also a crude understanding of the treaty relationship where First Nations ought to be provided for since so much was gained in return.

The claims made by these sportsmen and businessmen regarding Stoney hunting were inaccurate, often exaggerated and filled with language of intolerance toward First Nations. Such claims were disputed on occasion. One example is a letter in the spring of 1906 to the Indian Commissioner from Indian Agent T.J. Fleetham from Morley wherein he enclosed the article from the Vancouver *Daily Province* by Mr. J.H. Brewster. In Fleetham's opinion the article was "untruthful from beginning to end."[82] He stated that a response should be submitted to the *Albertan* in Calgary to give the public a "truthful account" and "not have the Stony painted blacker than he deserves."[83] He also pointed out that Brewster had made some statements in the *Calgary Herald* some weeks before. Fleetham contradicted Brewster's claim of 300 hunters by referring to the 1904 Treaty Pay Sheets which shows a Stoney population total of 652 with only 142 men, including some who were too old to hunt. He estimated "real hunters cannot number more than 120."[84] He also responded to invalid assertions by Brewster that the Stoney's cattle

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[81] *Ibid.*
[82] NAC, RG 10, Vol. 6732, file 420-2 typed letter from T.J. Fleetham, Indian Agent, Morley dated March 10, 1906 addressed to the Indian Commissioner, Winnipeg.
[83] *Ibid.*
[84] *Ibid.*

herds were decreasing because they were killing them to eat; that the only agriculture possible there was growing green feed for horses and cattle; and that for two years the Stoneys were actually delayed by 10 to 14 days compared to previous years from leaving the reserve to go to their hunting grounds.[85] Mr. Fleetham stated "if Mr. Brewster, and his friends, or customers who support him in earning his living, would respect the game laws", then the Stoneys will be kept within bounds, but he stated that the Stoneys and others also knew "all about white people killing game during the close season, a fact that cannot be disputed and winked at by the authorities."[86]

Another article, appearing in the *Daily Province* on March 10, 1906, responded to the February 24th interview with J.H. Brewster which was published in the *Daily Province* earlier. The author argued that it is not right to protect the game from the Stoney Indians only to let it be "destroyed by American tourists who have no right to the game."[87] In his opinion, the American sportsmen were useful only to "the guides and hotels" and hunt "without making any contribution toward the game preservation."[88] The author of the article also pointed out that almost every party of "these foreign tourists that has hunted in our mountains has been outfitted and guided by Mr. Brewster and his fellow guides of

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[85] *Ibid.*
[86] *Ibid.*
[87] NAC, RG 10, Vol. 6732, file 420-2, newspaper clipping signed "Fair Play" in the *Daily Province*, Vancouver, March 10, 1906.
[88] *Ibid.*

Banff".[89] The author also stated that "nine out of ten of these parties have hunted in the close[d] season and killed both goat and sheep."[90] He noted it was "only last summer that one of Brewster's parties was caught raiding the British Columbia side of the mountains for goat, and that the guide in charge was fined for having the heads, hides and meat of fresh-killed goat in camp."[91]

In this response the author related another incident which he claimed was "a matter of common report."[92] A party of German noblemen, guided by Banff guides, hunted within the National Park and killed 17 goats in the closed season. The author stated that Mr. Brewster "must show us a better reason for preserving game than that it hurts his private business and that American millionaires want to kill it off when we have it preserved."[93] He argued that it would be better to let them be wiped out "by the original owners of the soil, the game and the waters, who have at least a color of right" than to allow sportsmen do so.[94] The author stated that Brewster would be more likely to obtain sympathy of those in authority if he would prevent the breaking of the game laws by his guides and his sportsmen clients.

Despite the presence of some support for Indians and their rights, many local newspapers were supportive of sports hunters' values and

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[89] *Ibid.*
[90] *Ibid.*
[91] *Ibid.*
[92] *Ibid.*
[93] *Ibid.*

catered to a largely sports-hunter readership. For example, John Hall, Editor of the *Calgary Herald* wrote to the Superintendent General of Indian Affairs asking for information on which Bands were subject to the game laws and which Bands were still exempt.[95] A full list of First Nations originally declared subject to the game laws was supplied by Indian Affairs to him.[96] Various newspapers ran a small advertisement announcing the public notice which named which First Nations that were subject to the provincial game laws.[97]

The *Macleod Gazette* also published a comment in October of 1895 discussing changes to the *North West Territories Game Ordinance*, but spent a majority of the article on the issue of Stoney First Nations hunting of big game.[98] The author argued that the legislators should totally prohibit the hunting of big game sheep and goats until their numbers were replenished. The author also noted that the "almost total extinction" of big game along the mountains was the "inevitable result of the foolish and suicidal policy of allowing the Stonies to disregard the game laws."[99] The author also stated, "The Gazette and the Lethbridge and Calgary newspapers repeatedly urged that the Stonies be made

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[94] *Ibid.*
[95] NAC, RG 10, Vol. 6732, file 420-2, type written letter from John Hall, Editor, *Calgary Herald* dated May 28, 1903 addressed to the Superintendent General of Indian Affairs, Ottawa.
[96] NAC, RG 10, Vol. 6732, file 420-2, type written letter from J.D. McLean, Secretary dated June 6, 1903 addressed to John Hall, Editor, Calgary Herald, Calgary, N.W.T.
[97] NAC, RG 10, Vol. 6732, file 420-2, The Albertan Publishing Co. account receipt for advertisement for Indian Affairs dated May 23, 1903.
[98] NAC, RG 10, Vol. 6732, file 420-2, newspaper clipping entitled "The Game Ordinance" in the *Macleod Gazette*, October 2, 1895.
[99] *Ibid.*

amenable to the game laws and the Gun Clubs of these places personally interviewed the Minister and Indian Commissioner on the same subject."[100] This illustrated the multiple avenues of pressure used by sportsmen. The author also argued the result is that "one of the greatest charms of the mountains [trophy sheep] as well as a substantial source of profit has been almost totally destroyed."[101] The author of this article was obviously a strong supporter of the conservation of game for the use of sportsmen and a source of profit. Such pressures applied by sportsmen and legislators was difficult for the Indian Affairs Department to resist.

4.4 Department of Indian Affair's Reaction to Lobby Pressures

The Department of Indian Affairs felt the pressure from the provinces and sportsmen. Consequently, their duty to look after the interests of First Nations with respect to hunting was, over time, rarely implemented. As they sought to balance the conflicting interests of their 'wards' with those of sportsmen, Indian Affairs moved more towards tipping the balance in favor of sports hunters values.[102] This is illustrated in a circular issued by Hayter Reed, Indian Commissioner, at

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[100] *Ibid.*
[101] *Ibid.*
[102] The term "wards" was often used to describe the Indians in their relationship with the Dominion government. It reflected the paternalistic attitude that Indians were dependents of the state, rather child-like, and requiring parental-like guidance, that is, they were seen as wards of the state.

Regina, North West Territories, to all Indian Agents in November, 1889.[103] In it he stated "although the Indians do not come under the jurisdiction of the [provincial and territorial] game laws, they should as far as possible, be made to conform to the spirit of them."[104] This policy, according to Reed, could be enforced to some degree by utilizing the following measures: "refrain from issuing ammunition during the close[d] season, and to take every available means for marking your strong disapproval of gathering eggs of birds or catching fish during the spawning season."[105] Reed also indicated that this policy is to be "faithfully" pursued for the benefit of the First Nations as for the interests of the settlers.[106] Besides the policy of attempting to restrict First Nations hunters during closed season, in 1890, Parliament responded by passing 53 Vic., c. 29, s.10, which amended the *Indian Act* by including s. 133:

> 133. The Superintendent General may, from time to time, by public notice, declare that, on and after the day therein named, the laws respecting game in force in the Province of Manitoba or the Western Territories, or respecting such game as it specified in such notice, shall apply to Indians within the said Province or Territories, as the case may be, or to Indians in such partes thereof as to him seems expedient.[107]

It is also clear the petition of the Fish and Game Clubs has some impact on their delegation of power. In response to the petitions

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[103] NAC, RG 10, Vol. 6732, file 420-2, hand written letter from Hayter Reed, Indian Commissioner, dated November 5, 1889, addressed to The Indian Agent.
[104] *Ibid.*
[105] *Ibid.*
[106] *Ibid.*
[107] *An Act to Further Amend 'The Indian Act'*, Chapter 43 R.S.C. (1890), 53 Victoria c.29, s.10.

discussed above, L. Vankoughnet, Deputy Superintendent General of Indian Affairs, sent a letter to T. Mayne Daly, Superintendent General of Indian Affairs, stating the crux of the sportsmens' petition is that First Nation hunters need to be brought under the game laws in order to protect the depletion of game.[108] Vankoughnet was careful enough to state that this is the argument of the Gun Clubs, which claim "the Indians" take eggs and kill young birds, that it is "the Gun Clubs' belief" that this will result in the depletion of game in a short period of time, and that the petitioners "while alleging that they have no wish to interfere with any Treaty rights of the Indians" want First Nations hunters placed on the same footing as white hunters.[109]

Vankoughnet also pointed out to the Superintendent General that the Indian Commissioner of the North West Territories, Hayter Reed, after fully considering the matter, recommended that "a proclamation be issued under 53 Vic., Cap.29, Sec.10, being additional Sec. 133 of the Indian Act, placing the Indian Bands described in his letter under the provisions of existing Game Ordinances in the North West Territories".[110] Vankoughnet argued that the Indian Commissioner for the North West Territories "is the most likely person to know whether the application of the Game Ordinances ... to the Indian Bands referred to by him would be

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[108] NAC, RG 10, Vol. 6732, file 420-2, typed letter/memorandum from L. Vankoughnet, Deputy Superintendent General of Indian Affairs, dated February 18, 1893, addressed to The Honourable T. Mayne Daly, Superintendent General of Indian Affairs.
[109] *Ibid.*
[110] *Ibid.*

likely or not to cause such dissatisfaction among them as might result in serious consequences" and also pointed out that "the same conditions do not now exist" that would previously have caused Indian opposition referring to disturbances in the south no longer being a factor.[111] He was referring to Indian uprisings and the scare associated with the peak of the Ghost Dance religion that had occurred south of the border in recent years.[112] Further, the Metis and First Nations relating to the Riel resistances were still in recent memory.[113] Vankoughnet concluded on this basis that he saw "no reason for dissenting from the opinion expressed by the Indian Commissioner."[114] Thus, as long as the threat of a First Nations uprising was reduced, the Indian Affairs Department would support the use of s. 133 of the *Indian Act* to bring certain named First Nations under the *North West Territories Game Ordinance*. The strength of the treaties were overlooked by the Department officials so long as it was the federal government infringing on treaty rights to a livelihood.

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[111] *Ibid.*

[112] John Jennings, "The North West Mounted Police and Indian Policy After the 1885 Rebellion" in F. Laurie Barron and James B. Waldram, eds., *1885 And After: Native Society in Transition* (Regina: Canadian Plains Research Centre, 1986) 225 at 232. The Ghost Dance was said to be given to a Paiute Indian messiah by the Creator, who in turn, taught it and its teachings to other tribes. The teachings included doing right and not hurting others. The dance was said to make the buffalo plentiful again. White settlers and Indian agents began to interpret the resurgence in traditional ceremonies and dances as "increased Sioux militancy." See Allison M. Dussias, "Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases" (1997) 49 *Stanford Law Review* 773 at 794-795.

[113] *Ibid.*

[114] *Supra,*, note 108.

The Indian Affairs Department then sent the file to the Department of Justice to draft the proclamation to bring the named Bands under the *North West Territories Game Ordinance*.[115] On February 28, 1893, the Acting Deputy Minister of Justice sent a draft a public notice to Vankoughnet, which stated:

> **Public Notice is hereby given in pursuance and by virtue of Section 133 of the Indian Act (as enacted by 53 Victoria, Chapter 29, Section 10) that on and after the day of ____ A.D., 1893, the Laws respecting game in force in the North West Territories shall apply to the following Indians, that is to say;**
>
> > **(Here define the Indians whom the laws are to be extended)**
>
> **Dated at the Department of Indian Affairs at Ottawa this day of February, A.D., 1893.**
>
> **Superintendent General**
> **Of Indian Affairs**[116]

On March 6, 1893, this draft was sent to Indian Commissioner Hayter Reed to "fill in the blanks" by adding the list of Bands to which the proclamation should apply.[117] Reed sent the draft with the names of the First Nations filled back to the Department of Indian Affairs on April 8, 1893.[118] The First Nations covered under the public notice included

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[115] NAC, RG 10, Vol. 6732, file 420-2, typed letter from L. Vankoughnet, Deputy Superintendent General of Indian Affairs, dated February 27, 1893, addressed to the Acting Deputy Minister of Justice

[116] NAC, RG 10, Vol. 6732, file 420-2, Copy of Public Notice attached to typed letter from the Acting Deputy Minister of Justice dated February 28, 1893, addressed to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, Ottawa.

[117] NAC, RG 10, Vol. 6732, file 420-2, hand written letter from author unknown, dated March 6, 1893, addressed to the Indian Commissioner for Manitoba and the North West Territories, at Regina.

[118] NAC, RG 10, Vol. 6732, file 420-2, hand written letter from Commissioner Hayter Reed, dated April 8, 1893, addressed to the Deputy of the Indian Commissioner of Indian Affairs, at Ottawa.

most Bands in Treaties 4, 6 and 7.[119] A list was drafted in June of 1893 signed by T.M. Daly, Superintendent General of Indian Affairs.[120] Commissioner Reed stated in a letter in April, 1893 that "There are a few Bands to the North of the North Saskatchewan, whom I have not yet decided to include in this list, as I wish first to see the result of the operation of the Laws upon other Bands."[121] Also, some of these bands had not yet entered treaty.

Deputy Superintendent General Vankoughnet advised that "it would be but fair to give them [First Nations] plenty of time before they are brought under the operation of the said laws" and proposed they should delay until "on or after the 31st day of December 1893" before the laws would apply "in order that the minds of the Indians may be prepared for the change."[122] The fear of First Nations reacting negatively to the proclamation was echoed by Commissioner Hayter Reed in a letter to Vankoughnet [123]

The Proclamation was made law when it was published in the *Canada Gazette* in 1894 as required by s. 133 of the *Indian Act*. There is a hand written note in the Department of Indian Affairs files which states

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[119] A list of the First Nations brought under the scope of the territorial game laws is given in Appendices.
[120] NAC, RG 10, Vol. 6732, file 420-2, Typed public notice of s. 133 application of game laws, which listed all Bands to which it applied to.
[121] NAC, RG 10, Vol. 6732, file 420-2, typed letter from Commissioner Hayter Reed, dated April 8, 1893, addressed to the Deputy of the Indian Commissioner of Indian Affairs, at Ottawa.
[122] NAC, RG 10, Vol. 6732, file 420-2, typed letter from Deputy Superintendent General of Indian Affairs, L. Vankoughnet, dated April 13, 1893, addressed to the T. Mayne Daly, Superintendent General of Indian Affairs.

merely "Stoney Bds not included in Proclamation of 1894."[124] Given all the controversy surrounding them one would assume they would be the first. However, the Indian Affairs Department felt the Stoneys were still not quite ready to be brought under the game laws.[125]

Soon after the Proclamation brought First Nations under provincial and territorial laws, First Nations began to protest and argued that they understood they would be able to continue their traditional livelihood as promised in the treaties.[126] Indian Affairs officials generally began to inform First Nations that "the protection of game was more in the interest of the Indians than whites" and that "under the Treaty the Government reserved the right to make regulations to govern Indians at this avocation."[127] The Deputy Superintendent General of Indian Affairs also responded to the protests of First Nations by stating "I beg to inform you that we cannot at the very outset begin making such exceptions" and stated it would be better to aid (provide rations to) the First Nations if necessary and protect the game than to allow them an exception to the game laws to hunt at all seasons.[128] The policy now seemed to be moving

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[123] NAC, RG 10, Vol. 6732, file 420-2, typed letter from Indian Commissioner, North West Territories, Hayter Reed at Regina dated April 22, 1893 addressed to the Deputy Superintendent General of Indian Affairs.

[124] NAC, RG 10, Vol. 6732, file 420-2, hand written note, author unknown, no date, circa 1893.

[125] NAC, RG 10, Vol. 6732, file 420-2, typed letter from T. Mayne Daly, Superintendent General of Indian Affairs dated May 8, 1894 addressed to the Lieutenant Governor Mackintosh at Regina, North West Territories.

[126] NAC, RG 10, Vol. 6732, file 420-2, typed letter from Indian Agent J.A. Markle of Birtle, Manitoba dated November 2, 1893 addressed to the Indian Commissioner at Regina.

[127] *Ibid.*

[128] NAC, RG 10, Vol. 6732, file 420-2, typed letter from the Deputy Superintendent General of Indian Affairs dated November 13, 1893 addressed to the Assistant Indian Commissioner at Regina, NWT.

towards allowing no exceptions to the application of provincial or territorial game laws to First Nations despite the treaty promises made to them. The Department of Indian Affairs felt that Parliament had clear jurisdiction over Indians under the Constitution and the proviso in the treaties allowed for Parliament to regulate hunting rights from time to time.

Lieutenant Governor Mackintosh of the North West Territories also felt there was a need to extend game laws to the Stoneys. In his opinion the "necessity for legislation preventative of the destruction of Game within the limits of the Rocky Mountain Park by Stoney Indians was" clear.[129] He stated he learned from a "gentleman of wide experience, and ardent sportsman and very reliable as an advisory authority" that "many of the Indians had been endeavoring to sell the flesh of the Mountain sheep and also had quantities of trout, which they attempted also to dispose of."[130] Mackintosh argued for the establishment of a Rocky Mountain Park to be "set apart as an asylum, a domain of refuge" where wild animals would be free from "the intrusion of the slaughterer and be permitted to multiply" to supply the outlying areas for the "sportsman [to] have his day."[131] Although there is some language referring to the protection of game to prevent possible extinction, the dominant purpose

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[129] NAC, RG 10, Vol. 6732, file 420-2, typed letter from the Lieutenant Governor Mackintosh of the North West Territories dated May 2, 1894 addressed to The Honorable T.M. Daly, M. Minister of the Interior at Ottawa.

[130] *Ibid.*

[131] *Ibid.*

of Mackintosh's recommendation to regulate the Stoneys is to conserve the game so as to let the sportsmen have their day.

In response, Superintendent General T. Mayne Daly wrote back to Mackintosh, "I have caused an order to be issued prohibiting the Stony and other Indians from hunting or trapping within the limits of the Rocky Mountain Park."[132] He also stated that the Stoney First Nations were not included in the Proclamation because "it was not considered prudent in their stage of advancement" to have their hunting rights suddenly restricted because this would require the Government to feed them.[133] Further he noted that the Department of Indian Affairs had already decided to bring the Stoneys within the operation of the Ordinances" after giving them due notice, that is, the application of the game laws would be delayed until January1st, 1895.[134] However, Hayter Reed, NWT Indian Commissioner, sent a letter in May 1894 to A.E. Forget, Assistant Indian Commissioner, requesting that orders be issued immediately restricting all "Indians" from hunting or trapping within the Rocky Mountain Park."[135] Noting that complaints were made of the Stoney Indians, he also ordered that the "Police be advised of the action taken, so that they may enforce the prohibition by driving out of the Park any

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[132] NAC, RG 10, Vol. 6732, file 420-2, typed letter from T. Mayne Daly, Superintendent General of Indian Affairs dated May 8, 1894 addressed to the Lieutenant Governor Mackintosh at Regina, North West Territories.
[133] *Ibid.*
[134] *Ibid.*
[135] *Ibid.*

Indian found hunting or trapping therein."[136] This action preceded the public notice under s. 133 of the *Indian Act* proclaiming that on or after January 1st, 1895, the game laws in force in the North West Territories "shall apply" to the Stoney Indians.[137]

Breaking the news to the Stoney First Nations that they would be subject to the game laws fell to P.L. Grasse, Farming Instructor at the Stoney Reserve at Morley. Grasse stated in a letter to the Assistant Commissioner that he called a meeting "of all the Stonies" on the 17th of May, 1894 and "read over the game laws to them, and told them they were now under these, by law."[138] He stated the Stoneys raised many concerns but he explained the necessity of the game laws and "in a short time, every man sided in with me."[139] He said he convinced them that the closed season would be okay since they would be busy getting crops in, fixing fences, installing new fences, branding cattle and purchasing cattle. Then they would hay and harvest. Then they would get their annuity money and it would be open season so they could all go off on a big hunt. He also persuaded them that during the closed season for hunting, they could go fishing at "their lake set apart for them in the mountains" since he had asked for twine, fish hooks and a boat for

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[136] NAC, RG 10, Vol. 6732, file 420-2, typed letter signed by Hayter Reed dated May 8, 1894 addressed to A.E. Forget, Assistant Indian Commissioner, at Regina, NWT.
[137] NAC, RG 10, Vol. 6732, file 420-2, typed Public Notice from Superintendent General of Indian Affairs, T. Mayne Daly dated May 9, 1894.
[138] NAC, RG 10, Vol. 6732, file 420-2, hand written letter from L. Grasse, Farmer at Stoney Reserve, Morley dated May 17, 1894 addressed to the Assistant Commissioner, Regina.
[139] *Ibid.*

them.[140] Grasse claimed the idea delighted them and "they [were] all in splendid humor."[141] This was illustrative of the Department of Indian Affairs officers moving towards support of the application of game laws upon Indians.

In Spring 1900, an Indian Agent raised the issue of whether amendments to provincial or territorial game laws also applied to the First Nations named in the Proclamation of 1894.[142] This was an important issue as it was unclear whether the game laws in force at the time of the Proclamation included later amendments. As mentioned earlier, this was to be ultimately decided in the 1910 case of *Stoney Joe*.[143] A Memorandum of Law was prepared by a Law Clerk of the Department of Indian Affairs regarding "Game Laws, N.W.T." wherein he expressed the opinion that "the Game Laws from time to time in force in the Territories apply to the Indians of the bands named in the Notice as the same laws are from time to time amended until the public notice is revoked."[144] Thus, the Law Clerk concluded that later amendments to the game laws automatically applied to the named Bands in the Proclamations. J.D. McLean, Secretary of Indian Affairs, then wrote back to the Indian Agent to state that the amendments were applicable to the

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[140] *Ibid.*
[141] *Ibid.*
[142] NAC, RG 10, Vol. 6732, file 420-2, type written letter from J.A. Mitchell, Indian Agent, Muskowpetung's Indian Agency, Qu'Appelle O. Assinaboia dated February 12, 1900 addressed to the Secretary, Department of Indian Affairs, Ottawa.
[143] *Supra*, note 38.
[144] NAC, RG 10, Vol. 6732, file 420-2, type written Memorandum "Game Laws, N.W.T." by Law Clerk, Department of Indian Affairs dated March 6, 1900

First Nations named.[145] The conclusion by the Law Clerk was ultimately found to be an error in law, since the Alberta Appeal Court decided in *Stoney Joe* that amendments do not (of themselves) apply to the First Nations named.[146] Rather, such amendments must be considered by the Superintendent General of Indian Affairs and proclaimed to apply.

In Spring 1903, David Laird, Indian Commissioner from Winnipeg, recommended that "owing to the extension of the various railway systems and the rapid settlement of the country" that a proclamation should be issued to bring other named Bands under the game laws.[147] Thus, more First Nations would be brought under provincial game laws.[148] Bands listed in his letter were most of the ones originally exempted from the 1894 Proclamation's ambit. The result was a Public Notice dated May 1, 1903 pursuant to s. 133 of the *Indian Act* declaring that certain Bands were subject to the game laws in force in the North West Territories.[149] A letter from the Secretary addressed to the King's Printer authorized the publication of the Notice in "the newspapers in the N.W. Territories", government advertisements and in the *Canada Gazette*.[150]

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[145] NAC, RG 10, Vol. 6732, file 420-2, type written letter from J.D. McLean, Secretary, Ottawa dated March 6, 1900 addressed to J.A. Mitchell, Indian Agent, Muskowpetung's Agency, Qu'Appelle, Assinaboia.
[146] *Supra*, note 145.
[147] NAC, RG 10, Vol. 6732, file 420-2, type written letter from David Laird, Indian Commissioner dated April 2, 1903 addressed to the Secretary, Department of Indian Affairs, Ottawa.
[148] A list of the First Nations brought under the scope of the territorial game law is printed the Appendices.
[149] NAC, RG 10, Vol. 6732, file 420-2, type written Public Notice dated May 1, 1903 under the hand of W. Mulock, Acting Superintendent General of Indian Affairs.
[150] NAC, RG 10, Vol. 6732, file 420-2, type written letter from the Secretary dated May 9, 1903 addressed to the King's Printer, Ottawa.

A good illustration of how far the Department of Indian Affairs moved towards adopting sports hunters' values is an informal inquiry undertaken by Indian Affairs into how much game was being taken by First Nations in Southern Alberta in the winter 1903-1904. Deputy Superintendent General Pedley received a report from Indian Agent J.A. Markle of the Blackfoot Indian Agency at Gleichen in late December of 1903 that he could not give a positive answer about "whether Indians kill Rocky Mountain sheep, moose and caribou both in and out of season" but "that there were no good reasons for many of the complaints."[151] Markle also stated that the "Indians are not the only lawbreakers in this district", referring to "Whites" and "settlers" around Red Deer River.[152] He stated that he did not know of a better way to deal with First Nations hunters taking too much game than by strictly enforcing the game laws in the areas where complaints have been made.

Indian Agent J.H. Gooderham of Macleod responded to Pedley's inquiry that "the Indians of this reserve do no hunting", a seemingly strange statement.[153] Agent R.N. Wilson from the Macleod Blood Agency also wrote to say that "the Indians of this reservation do practically no hunting and game laws other than those affecting fish and fowl are of no

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[151] NAC, RG 10, Vol. 6732, file 420-2, for example, see typed letter from J.A. Markle, Indian Agent, Blackfoot Indian Agency, Gleichen, Alta. dated December 22, 1903 addressed to Frank Pedley, Deputy Superintendent General of Indian Affairs, Ottawa.

[152] *Ibid.*

[153] NAC, RG 10, Vol. 6732, file 420-2, hand written letter from J.H. Gooderham dated December 23, 1903 addressed to Frank Pedley, Deputy Superintendent General of Indian Affairs, Ottawa.

interest to them or to this Agency."[154] This was a rather strange statement since game laws were likely to affect the interests of all First Nations. These reports stated that their respective "Indians" either do not hunt, as Gooderham and Wilson stated, or spend very little time hunting at all, as Markle stated. Further, Markle argued that most hunting done by First Nations in his agency is done during open season and that they return "before the close of the open season."[155] Thus, they seem to be supporting the proposition that restricting First Nations hunting by allowing them to hunt only during open season might not have that great of an impact. However, as Markle and others have noted, the Stoney First Nations were a difficult matter since they depended on the hunt for survival. As indicated in my previous discussions of the Treaty 8 areas, Northern First Nations also depended on the hunt to survive.[156]

As the Department of Indian Affairs became persuaded by the provinces and sportsmen, it began to justify the application of game laws to First Nations by arguing that such restrictions on hunting would assist in settling First Nations persons to a farming lifestyle. For example, one Indian Agent argued that it would be beneficial if game

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[154] NAC, RG 10, Vol. 6732, file 420-2, typed letter from R.N. Wilson, Indian Agent, Blood Agency, Macleod dated January 11, 1904 addressed to Frank Pedley, Deputy Superintendent General of Indian Affairs, Ottawa, Ontario.

[155] NAC, RG 10, Vol. 6732, file 420-2, typed letter from J.A. Markle, Indian Agent, Blackfoot Indian Agency, Gleichen, Alta. dated December 22, 1903 addressed to Frank Pedley, Deputy Superintendent General of Indian Affairs, Ottawa.

[156] See my discussion at page 16 above.

laws were amended to lengthen the closed season because he needed his "Indians" on hand on the reserve no later than May 1st to begin seeding, while in November they were needed on the reserve for rounding up cattle.[157] He also expressed that "[he] understand[s] it is [his] duty to compel my Indians to settle down to farming and to be self-supporting by tilling the soil and raising cattle on their reserves".[158] These reports from Indian Agents seem to illustrate an attitude that close seasons on First Nations hunting would be desirable and would actually assist in having them learn the sedentary life and duties of a farmer. This was a form of social control.

Indian Agents around the Calgary area seemed to have been persuaded by the sportsmen. Indeed, they began to use the same inflammatory rhetoric as the sportsmen. For example, the report from the Sarcee Agency at Calgary, submitted by A.J. McNeill, stated there is "no doubt in my mind that big game ... are being killed both in and out of season by the Indians of the Stony Band."[159] He admitted that he did not have personal knowledge "to what extent these animals are being destroyed" since the Stoney First Nations are not part of his agency, but was relying on what he had learned from "responsible parties."[160] He revealed his sources when he stated that it has been "common talk in

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[157] NAC, RG 10, Vol. 6732, file 420-2, typed letter from H. Martineau, Indian Agent, Touchwood Agency dated March 23, 1904 addressed to the Secretary, Department of Indian Affairs, Ottawa.
[158] *Ibid.*
[159] NAC, RG 10, Vol. 6732, file 420-2, typed letter from A.J. McNeill, Indian Agent, dated December 29, 1903.

Calgary among sportsmen and others that if this continues, all the big game in the Mountains and foothills will soon be exterminated the same as the Buffalo."[161] McNeill also noted that there was "a good deal written in the Calgary 'Herald' a Conservative paper concerning this matter and the Government has been very much found [at] fault with for not compelling the Indians to remain on their Reserve during close season, and made to obey the game law the same as Whitemen."[162] Consequently, he proposed that certain measures be taken "to put an end to this wholesale slaughter" under which "the Indians [would] be rationed the same as other Bands, and induced to remain at home and carry on farming and Cattle ranching, getting out firewood, coal et cetera, and thus be made to work for what they get from the Government."[163] It was his opinion that by "dealing firmly but with discretion with these Indians" that "this evil of hunting big game in the Rocky Mountains in season and out of season can be overcome."[164] He argued that if this is done, "the Indians will at the same time become more prosperous."[165] This Indian Agent's inflammatory language comes through clearly when he refers to Stoney hunting of big game as "this wholesale slaughter" and "this evil of hunting big game". He uncritically accepts the information of

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[160] *Ibid.*
[161] *Ibid.*
[162] *Ibid.*
[163] *Ibid.*
[164] *Ibid.*
[165] *Ibid.*

local sportsmen who have their own vested interests in big game hunting.

A second inflammatory report was sent by Indian Agent H.E. Sibbald of the Stoney Agency at Morley who stated that "it is quite true that the Stonies, who are the only hunters along these mountains, kill a great number, and with the aid of dogs co[r]ner up and kill whole bands of sheep and goat."[166] He gave an example "of how they slaughter" by stating one Stoney member told him he killed thirty six sheep since September, twelve in one day.[167] Sibbald made his estimate of the numbers of animals taken when he stated that there are about 90 hunters who on average kill about 10 head of sheep, goat or deer, which he said meant about 900 animals a year were taken by the Stoney hunters. He stated, "this may seem large but I am sure I have not overestimated much" since he recalled seeing "a family of six eat a whole deer in two days".[168] He claimed "they are terrible meat eaters if they get it, and all look good and fat when they come back."[169]

Not clearly explaining why the Stoney took quantities of big game, Sibbald disclosed the reason in a round about way by stating that the Stoney "have mostly been away since the 20th of Sept. and went with the

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[166] NAC, RG 10, Vol. 6732, file 420-2, typed letter from H.E. Sibbald, Indian Agent, Morley dated December 23, 1903 addressed to Frank Pedley, Deputy Superintendent General of Indian Affairs, Ottawa.
[167] This figure of 36 sheep in total taken by one Stoney hunter in over two months, and having killed six in one day, is likely the original source of the figure given above by Phillip Moore, the Banff sportsman who tended to exaggerate his claims about Stoney hunting. Moore stated he knew of a Stoney hunter who killed 36 sheep in one day.
[168] *Ibid.*
[169] *Ibid.*

intention of laying a supply of dried meat to be used along with the Government ration while on the reserve."[170] Thus, the Stoney hunters tended to take enough animals to dry a quantity of meat to last the winter. Also the fact that only about 90 members were hunters would mean that they must take enough animals to supply most of the other members as well. Further there could also have been an economic incentive as stated by Sibbald where "they can go out for a few days and kill a sheep with large horns which they could sell to a trader for from $10-to-$40" since the only employment for them at the time was the dry wood trade which would not last long.[171]

Sibbald stated that since there were no game guardians to patrol the Park borders "the Indians have killed game in the Park limits."[172] He also stated that since the extension of the Park boundary, "the Indians have had to go farther north across the Saskatchewan."[173] This would indicate that the Stoneys were avoiding hunting in the Park and traveling further distances to hunt since the Park extension "took in the best part of the [Stoney's] hunting grounds."[174] The creation of the Park and its extension into the traditional hunting grounds of the Stoneys was done unilaterally by the federal government with no consultation with the Stoneys or other First Nations whose traditional hunting and gathering

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[170] *Ibid.*
[171] *Ibid.*
[172] *Ibid.*
[173] *Ibid.*
[174] *Ibid.*

territories were being taken up. By not consulting with the First Nations and infringing upon their ability to exercise their treaty right to hunt, the Dominion government essentially breached its trust-like duty that it owed to the Stoney.

Sibbald reflected a strongly shared attitude among Department of Indian Affairs officials about First Nations. Restrictions on Indian hunting was not so much about conservation as European feelings of superiority and the value of a sportsman like hunt. This is illustrated in his comment, "I have been opposed to their hunting ever since I came to the reserve for two reasons, first the exterminating of the game, and secondly as long as they can hunt you cannot civilize them."[175] He blamed hunting as the cause of their being "no more civilized now than when I first knew them" twenty six years earlier and if another livelihood is not found for them, they would stay "in the same existence all the time."[176] His language also reflected deeply held attitudes of the time when he described the Stoneys as "terrible meat eaters" who "slaughter" game.[177] He also thought the Stoneys' "idea of the game question is very strange" since they raise the fact that "when selling the country to the Government they did not sell the game" and do not see why they should not be able to carry on their livelihood.[178] Obviously Sibbald had little

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[175] *Ibid.*
[176] *Ibid.*
[177] *Ibid.*
[178] *Ibid.*

appreciation of the significance of the treaty promises to the Stoneys who believed the treaty protected their traditional livelihood.

Agent Sibbald stated that he had done all he could "to try to explain the benefits derived from preserving the game" and had explained to the Stoneys that "the game ordinance is for the protection of the different animals so that we would always have game."[179] These statements illustrate the belief of officials that regulation for the preservation of game may be necessary for the continuance of the supply of game. However, a more accurate view of the underlying reason for conservation of game is reflected when Sibbald stated "If the number of American sportsmen who come to the mountains to hunt increases as they have been doing for the last few years, the amount of money spent in the past by these people will be enormous, as I have known of men spending two or three thousand dollars and were satisfied if they secured one or two good specimens."[180] Thus, the attitude appears to be that it is fine for sportsmen to buy themselves a chance to hunt for sport and possibly a trophy or two, but it is "slaughter" if First Nations take quantities of big game for food or barter. There is little or no respect given for their traditional livelihood, even though it was expressly reserved in the treaties.[181] The values associated with the products of the

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[179] *Ibid.*

[180] *Ibid.*

[181] Treaty 7 hunting clause, as reprinted in , *The Treaties of Canada With the Indians of Manitoba and the North West Territories Including the Negotiations on Which They Were Based* (Calgary: Fifth House Publishers, 1991) originally published in 1880 and the related discussion in the text about treaty hunting.

hunt are reflected in a statement by Sibbald wherein he remarked that restrictions on the purchase of sheep and goat parts would likely have little effect on the Stoneys because "they will kill them for their meat and throw away the heads."[182] This clearly shows an Indian Agent had internalized the sports hunters' value of trophy heads as the most important product of big game.

This "problem" of the Stoneys over-hunting was also brought to the attention of the Minister of the Interior and Superintendent General of Indian Affairs, Clifford Sifton, in a memorandum from Frank Pedley, which enclosed "all correspondence relative to the destruction of game by the Indians hunting in or near the Rocky Mountains."[183] Deputy Superintendent General Pedley stated in the letter, that based on the reports, including Agent Sibbald's report, "it would appear that the Stony Indians alone are engaged in the hunting complained of."[184] He referred to Sibbald's concerns that there is little employment for the Stoneys should they be required to stay on their reserve during closed season and the probability of considerable resistance to any restrictive measures. Pedley utilized the same inflammatory language in describing Stoney hunting as "indiscriminate and excessive killing" and "the destruction of game."[185]

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[182] *Ibid.*
[183] NAC, RG 10, Vol. 6732, file 420-2, typed letter from Frank Pedley, Indian Affairs, Ottawa dated January 21, 1904 addressed to Mr. Sifton.
[184] *Ibid.*
[185] *Ibid.*

After these developments we begin to see federal officials interpreting treaties to allow regulation of Indian hunting. This was inconsistent the Indian understanding of the promises made during treaty negotiations.[186] For example, by mid-1905, in response to First Nations protests to the application of the game laws in the Treaties 6, 7 and 8 areas, Indian Affairs Secretary J.D. McLean stated that the provision in the Treaties gave Indians the right to pursue their avocations of hunting and fishing, "subject to such regulations as might from time to time be made by the Government" and therefore they had "no good reason to complain of being required to observe regulations made for the preservation of game and fish" and further the protection of the game and fish "[was] in the interests of the whole community and most of all of that section thereof which they constitute."[187] McLean also stated that if the Indian Agents prohibit First Nations hunting and fishing, "that no doubt refers to illegal operations".[188] Of course what was considered 'illegal' was determined by the local territorial government, provincial and Dominion game laws, discussed earlier, which reflected sports hunters values. McLean's attitude reflected the distance the Department of Indian Affairs moved from carrying out their duty to look out for the interests and treaty rights of First Nations. He concluded that if First

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[186] See discussion in Chapter 1.
[187] NAC, RG 10, Vol. 6732, file 420-2, typed letter from Secretary J.D. McLean, Ottawa dated August 18, 1905 addressed to Charles Fisher, Indian Agent, Carlton Agency, Mistawasis, Sask.
[188] *Ibid.*

Nations disregard the law, the Department would have no power to protect them from the consequences.[189]

Stoney leaders protested limitations on their ability to carry on their livelihood. In response to concerns raised by Stoney leaders respecting restrictions on their rights to hunt, Deputy Superintendent General Pedley issued a similar response to Maclean's. He indicated that the Department had "no power to interfere with any action any province may see fit to take for the protection of its game, even if it thought it advisable to do so."[190] He also stated that the Stoney would not need to rely so much on wild meat if they were more industrious. He argued that the Department "has always been willing to help any of you [Indians], who have done your best to help yourselves."[191] Responding to the First Nations who asked about having a voice in the provincial Legislature on these matters, Pedley stated "it would not be right nor possible for you to be represented in the legislature" as the Department would look after First Nations interests if any provincial laws affected them injuriously.[192] It is ironic that he would make such a statement when the policy taken by the Department seemed to be one of allowing the prosecution of First Nations hunters who violated game laws when hunting for their livelihood. In fact then, the Department of Indian Affairs was not

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[189] *Ibid*, at 2.
[190] NAC, RG 10, Vol. 6732, file 420-2, typed letter from Frank Pedley, Deputy Superintendent General of Indian Affairs, Ottawa dated April 27, 1907 addressed to the Chiefs and Councilors, Stony Reserve, Morley, Alta.
[191] *Ibid.*

fulfilling its fiduciary-like duty to protect First Nations from injurious laws.

With respect to the legal standing of treaties, the proviso allowing regulation inserted in the treaty hunting clauses was seen to provide the federal government with the authority to impose restrictive hunting regulations.[193] With s. 133 of the *Indian Act*, the federal government exercised its jurisdiction over 'Indians' and avoided the necessity to enact laws mirroring provincial and territorial law by delegating this authority to the provinces and territories. In the summer of 1907, the Secretary of Indian Affairs responded to questions by First Nations asking about the application of this section and game laws and stated that Indians "are strictly subject to the provisions of the game ordinance of the Province, unless the said ordinance may exempt" them and that they were also "liable to all the penalties provided."[194]

Although the Department of Indian Affairs now agreed to the application of provincial game laws to First Nations, they felt better if fines for violation of provincial law were nominal preferring to scare First Nations hunters into conforming.[195] The odd agent felt the need to continue to protect Indian rights for subsistence hunting.[196] For

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[192] *Ibid.*

[193] See discussion of treaties in Chapter 1 above.

[194] NAC, RG 10, Vol. 6732, file 420-2, typed letter from the Secretary, Indian Affairs, Ottawa dated September 21, 1907 addressed to Chief Kitchmonias, Keeseekoose Band, Kamsack O., Sask.

[195] NAC, RG 10, Vol. 6732, file 420-2, typed letter from Secretary, Department of Indian Affairs, Ottawa dated July 9, 1907 addressed to William Gordon, Indian Agent, Balcarres, Sask.

[196] NAC, RG 10, Vol. 6732, file 420-2, typed letter from William Gordon, Indian Agent, Balcarres, Sask. dated July 3, 1907 addressed to the Secretary, Department of Indian Affairs, Ottawa.

example, one Indian Agent did not think it fair to punish a First Nations hunter who was charged with killing for food and asked if the Department would intercede in his case. Rather than intercede on behalf of the First Nation hunter and speak up for his treaty rights, Secretary J.D. McLean stated that killing four antelope for food "were rather too many for him to have killed for that purpose."[197] Taking a quantity of game seemed now to be frowned upon by Indian Affairs officials.

A Justice of the Peace from Peace River in Treaty 8 also wrote asking if he was to make any distinctions between "Indians and others" when it came to enforcing the prohibitions on the killing of beaver as set out in the Alberta *Game Act*.[198] Indian Commissioner H.A. Conroy responded that he understood that the provincial game laws were not currently applicable to any Treaty No. 8 First Nations under s. 66 of the *Indian Act* (successor to s. 133). This was confirmed to be so by Deputy Superintendent Pedley.[199] Pedley also told the Deputy Attorney General of Alberta that the Indian Affairs Department did desire to co-operate for the protection and preservation of fur and game and they were "open to question and discussion" regarding "how far if at all" the provincial game laws should be made applicable to the Treaty 8 First Nations. The Treaty 8 area was viewed as not being amenable to

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[197] NAC, RG 10, Vol. 6732, file 420-2, typed letter from Secretary, Department of Indian Affairs, Ottawa dated July 9, 1907 addressed to William Gordon, Indian Agent, Balcarres, Sask.
[198] NAC, RG 10, Vol. 6732, file 420-2, typed letter from F.S. Lawrence, J. Fort Vermilion, Peace River, Alta dated September 26, 1907 addressed to the Hon. C.W. Cross, Attorney General, Edmonton, Alta.

agricultural development, and with the Department of Indian Affairs worried about the costs of rations, they did not want northern Indians to be without their traditional livelihoods. The provinces generally went along with the idea since the northern First Nations were few and isolated. This involved a response from Alberta's Deputy Attorney General Woods wrote to Pedley arguing that the protection of game has always been regarded as "one of the matters falling within the exclusive jurisdiction of the Provinces" and that s. 28 of the Alberta *Game Act* "is binding on all persons, irrespective of 'race, creed or previous condition of servitude', within the Province, including Treaty 8 Indians, save only such persons as are by the Provincial law declared not to be within the purview of the law."[200]

The debate over the application of provincial game laws to the Treaty 6 area resulted in a Chief of Whitefish Lake, Alberta sending a letter to the Minister of the Interior Frank Oliver in May of 1909 wherein he asserted that his people had the right to follow their avocation of hunting and fishing until the land was settled and also raised the question of whether the "Provincial Government [had] the power to pass laws which would annul this treaty right."[201] In reply, the Secretary of

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[199] NAC, RG 10, Vol. 6732, file 420-2, typed letter from Frank Pedley, Deputy Superintendent General of Indian Affairs dated December 16, 1907 addressed to the Deputy Attorney General, Edmonton, Alta.
[200] NAC, RG 10, Vol. 6732, file 420-2, typed letter from the Deputy Attorney General of Alberta, Edmonton, Alberta dated January 2, 1908 addressed to the Deputy Superintendent General of Indian Affairs.
[201] NAC, RG 10, Vol. 6732, file 420-2A, hand written letter from Chief James Seenum, Whitefish Lake, Alberta dated May 3, 1909 addressed to the Honourable Frank Oliver, Minister of the Interior, Ottawa.

Indian Affairs wrote to Chief Seenum to state that "the Provinces hold that they have the sole right of legislating with regard to their game, and as the courts seem to uphold them in this contention, the Department can do nothing".[202] By these comments it appears that the Department of Indian Affairs accepted that First Nations hunters were subject to provincial game laws [pursuant to s. 133 and later s. 66 of the *Indian Act*]and that the Department could do little about it now.

The Department of Indian Affairs also feared reprisals from local citizens should the Department press too strongly in support of First Nations interests. As indicated earlier, many members of their electorate were game hunters and fishers who lobbied for the extension of provincial laws to apply to all First Nations. The responses to a request to enter media debates indicated federal officials were feeling defeated on the question of protecting Indian and Treaty rights. For example, in response to a request by one agent to reply to an article which appeared in the *Calgary Herald* condemning the Stoney First Nations hunters, Commissioner David Laird wrote to Secretary of Indian Affairs, J.D. McLean suggested there was no need to submit a contradiction in the *Calgary Herald* since "it would no doubt be answered and keep up an unnecessary agitation."[203] McLean wrote back to Laird agreeing that

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[202] NAC, RG 10, Vol. 6732, file 420-2A, typed letter from the Secretary, Indian Affairs dated May 21, 1909 addressed to Chief James Seenum, Whitefish Lake, Alberta

[203] NAC, RG 10, Vol. 6732, file 420-2 typed letter from David Laird, Indian Commissioner, Winnipeg dated March 16, 1906 addressed to the Secretary, Department of Indian Affairs, Ottawa.

there was really no reason to reply to the Calgary press since such attacks came "from prejudiced and self-interested sources."[204]

The foregoing examination of correspondence illustrates how the Department of Indian Affairs was affected by the sportsmen lobby and provincial pressures calling for First Nations hunters to be regulated by the local game laws. The Department increasingly became caught in the middle of conflicting interests with respect to the regulation of First Nations hunters. It attempted to balance the rights of the First Nations with those of the sports hunters, but increasingly the balance shifted toward the sports hunters.

4.5 Balance in Favor of Sports Hunters

The Dominion Government felt the pressures of sportsmen and the provinces and in its attempt to balance the conflicting interests, tipped the balance in favor of sports hunters. The Indian Department was afraid to stir up any animosity by the local sportsmen. They felt the pressure of the newspapers, which showed strong support for sportsmen and reflected the intolerance against First Nations hunters. The electorate was made up of many sport hunters and fishers. Furthermore, the provincial officials and local Indian agents also felt the pressure of the sportsmen. The territorial and provincial governments

[204] NAC, RG 10, Vol. 6732, file 420-2 typed letter from J.D. McLean, Secretary, Indian Affairs, Ottawa dated March 20, 1906 addressed to Hon. David Laird, Indian Commissioner, Winnipeg, Man.

sought to extend its game laws as fully as possible onto First Nations hunters hunting for food. The closed seasons, methods of hunting, rules of fair play in the *Game Act* all reflected values of the sports hunter. It did not reflect the values of First Nations hunters who relied to a greater extent than any other group on hunting. The jurisdictional debate at this time involved the extent to which territorial and provincial game regulations could interfere with First Nations hunting rights. The federal government had clear jurisdiction over "Indians" pursuant to s, 91(24) as well as through the treaty relationship with the First Nations. However, the Dominion Government acquiesced to the pressures of the sport lobby groups to delegate powers to the territorial and provincial governments to regulate Indian hunting. Furthermore, they would have felt the pressure nationally of the provincial rights movement, which saw provinces advocating and litigating the extensions of its powers.[205]

It would not be until the *Wesley*[206] case in 1932 that a superior court would hold that First Nations hunters in western Canada were not subject to the provincial game laws when hunting for food. The delegation of powers in the NRTA, 1930 reserved the right of First Nations to hunt for food unregulated by provincial game laws, which

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[205] The provincial rights movement was led by primarily by Oliver Mowat and other leaders from Ontario, Quebec and the Maritimes. They advocated for increased powers and protested their subordinate position relative to the federal government. They also were upset with federal disallowance of provincial and territorial legislation. See generally Robert C. Vipond, *Liberty and Community: Canadian Federalism and the Failure of the Constitution* (Albany: State University of New York Press, 1991) and Norman McL. Rogers, "The Genesis of Provincial Rights" (1933) 14 *Canadian Historical Review* 9 and Robert C. Vipond, "Constitutional Politics and the Legacy of the Provincial Rights Movement in Canada" (1985) 18:2 *Canadian Journal of Political Science* 267

reflects that the Department of Indian Affairs at least bargained in the Indians' interest for this concession from the provinces.

[206] R. v. Wesley [1932] 2 W.W.R. 33.

Chapter 5

5.0 Conclusion

In attempting to carry out their traditional livelihoods, First Nations hunters have come into conflict with our legal system. The result is essentially a cultural clash, where differing values collide. The importance of the hunt to First Nations involved viewing game animals as a gift from the creator and a spiritual relationship with animals. The importance of the hunt to sports hunters involved viewing game animals as objects for sport where animals were to be given a sporting chance of escape. The different values placed on game animals led to increasing competition for the resources.

The early game regulations set out what was to be legal hunting, that is, what was considered to be morally and legally acceptable methods and times of hunting. These legal hunting rules did not reflect the fact that First Nations relied on hunting year round for their food and commerce requirements.

The questions pursued in this thesis are "how did First Nations hunting come to be regulated?"; "why did they become regulated?"; and "what purposes did the game regulations serve?" Generally, academics writing about the development of game laws focus on the values of conserving game animals. However, when viewed from another

perspective, the regulations and their enforcement are reflective of sports hunters' values and interests.

The values towards game and the hunting of game in Western Canada were rooted in British history. Formal rules were developed for hunting. Methods and times of year for hunting were set out in the regulations. The object of hunting involved the thrill of the chase and the opportunity to bag a trophy. Such rules and objects reflected sportsmen's values. Sportsmen, game guardians and local legislators did not take the time to consider or learn about First Nations concerns. They merely saw First Nations hunters as competition for the game animals. The result was essentially a struggle over the allocation of the wildlife to interest groups.

The sportsmen and local officials in turn, applied pressure on the Dominion Government, especially the Department of Indian Affairs officials to bring First Nations under the local game regulations. The influence of sport hunters and their values on the Dominion government officials and the jurisdictional debate was demonstrated in the Department of Indian Affairs files.

With respect to the debate around jurisdiction at the turn of the century, it was relatively clear that the Dominion Government had exclusive jurisdiction over "Indians and lands reserved for Indians" pursuant to s. 91(24) of the *BNA Act, 1867*. The original provinces to Confederation along with the recent additions of British Columbia and

Prince Edward Island exerted their control over natural resources, including wildlife resources. The local legislatures in western Canada did not have the ownership or jurisdiction over natural resources since it was retained by the Dominion Government in order to carry out its National Policy goals of immigration and settlement of the west. However, the local legislatures in the North West Territories did seek to be treated as closely as possible like the provinces with all the same powers. Thus, they made continued attempts at legislating over wildlife and hunting within their local areas. Provincial and territorial game regulations could not apply to First Nations since this was beyond their jurisdiction and clearly within the exclusive jurisdiction of the Dominion government. Nevertheless, the local legislatures made attempts to extend their game regulations to all hunters, including First Nations hunters.

Sports hunters became increasingly upset at the fact that the local game regulations applied to them but not to First Nations hunters who hunted off reserve on unoccupied Crown lands. Their notions of equal treatment under the law along with their view of First Nations hunters as competition to the scarce resources led them to ignore the special treaty rights to hunt, which First Nations leaders had successfully negotiated.

The Dominion Government recognized First Nations interests in the game animals. There was clear recognition that they depended on the hunt for food and that if they were deprived of this resource they

would starve, which would cause the federal government to provide rations. The Dominion Government also gave recognition to the treaties in preserving the right of First Nations to hunt. However, with the increasing pressure by the sports hunter lobby groups and the provincial officials who sought to extend their jurisdiction over game, the Dominion Government delegated its powers to regulate First Nations hunting over to the local territorial and later provincial government by virtue of an amendment to the *Indian Act*, being section 133. Pursuant to s. 133, the Superintendent General of Indian Affairs declared a public notice, which named specific First Nations to be subject to the provincial or territorial game laws. Section 133 became s. 66 in the 1927 *Indian Act*. This section was the precursor to s. 87 of the 1951 *Indian Act* [later s. 88] which delegates federal jurisdiction to the provinces in matters where laws are of general application. This transfer of powers to regulate aspects of First Nations activities was deemed by the courts to be lawful.[1] Although Justice Stuart in 1910 stated in the *Stoney Joe* decision that it was lawful for the Dominion Government to delegate powers to the province, he restricted the scope of that delegation under s. 133 of the Indian Act by pointing out that he would not find a delegation of powers which would provide provincial officials a large discretion to legislate into

[1] *Stoney Joe*, [1981] 1 C.N.L.R. 117; *Hodge v. The Queen*, (1883) 9 Appeal Cases 117; for a general discussion of the delegation to another government agency, that is, an interdelegation, see Peter W. Hoog, *Constitutional Law of Canada* 3d Edition (Toronto: Carswell Thomson Professional Publishing, 1992) at 353.

the future any regulations that would be applicable to First Nations.[2] Thus, to Justice Stuart, delegation of authority to provincial officials to have regulations apply to First Nations without first being considered by the Superintendent General of Indian Affairs, who had constitutional obligations to look out for First Nations interests, was going too far. Since s. 133 stated that the Superintendent General may "from time to time" by notice declare provincial game laws to apply to named First Nations, there was an intention for a "repeated examination of the territorial law as it might be changed from time to time."[3] Thus, since the Dominion Government had exclusive jurisdiction over "Indians and lands reserved for Indians", there was a constitutional fiduciary-like duty to look out for the interests of First Nations. Delegation of powers to territorial or provincial governments did not relieve the Dominion government of this duty.

Another delegation of power also occurred in 1930. Section 12 of the *NRTA, 1930*, contains a hunting clause, which provided that provincial game laws were applicable to First Nations but with the proviso that provincial game laws would not apply to 'Indians' hunting for food purposes. Section 12 begins with the preface "In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence ... "[4] A plain reading of these

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[2] *Ibid.*
[3] *Ibid.* at 121.
[4] Section 12, Alberta *Natural Resources Act*, S.C. 1930, c. 3. Herinafter referred to as *NRTA*.

words shows that the purpose for delegating the federal government's power to the prairie provinces was to secure "a supply of game and fish" for Indians so that they could continue to pursue such game and fish for their support and subsistence. Within the time period of this study the Dominion Government was concerned about the supply of game for First Nations. They did not want to provide rations unless absolutely necessary. In order to secure a supply of game for the First Nations, they were willing to allow provincial game laws to apply to First Nations hunters.

The s. 12 delegation clause provides that "Canada [federal government] agrees that laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof ... "[5] The second part of this hunting clause is a proviso or exception to the main part of the clause, which states "provided however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year ... "[6] When read plainly, it seems clear that the intention of the federal Department of Justice officials who drafted the clause in consultation with the Department of Indian Affairs was that all provincial game laws would apply to First Nations hunters except when they are hunting for food purposes. The only other purposes for hunting contemplated at this time were hunting for commerce or hunting for

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[5] *Ibid.*

sport. Commerce hunting at the time included hunting fur-bearing animals. They also inserted the term "trapping" between hunting and fishing since this was an important livelihood for First Nations, especially in northern areas of the provinces. Thus, when First Nations hunters hunted for commerce or sport, they were to be subject to the provincial game laws as the delegation clause provided. However, when hunting for food purposes, the proviso is triggered and the provincial laws do not apply.

Legal historical research, which looks into the social and economic context at the time legislation was drafted, can provide a better understanding of what the intention of the drafters was, or at least, a better understanding of what must have been on their minds at the time. Indeed, as Tough has argued, "the lack of such research in the past has hampered the court's ability to deal with issues relating to Indian hunting in the prairie provinces."[7] The result is that courts make inconsistent decisions. The historical record in this study for this time period could influence the question on extinguishment of the commerce aspect of the treaty right to hunt. It can do this by showing what had occurred with respect to the diminishing protection accorded treaty rights to hunt during this period. For the decision makers, they knew that there were treaties entered into and that the First Nations took a

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[6] *Ibid.*

[7] Frank Tough, Introduction to Documents: Indian Hunting Rights, Natural Resources Transfer Agreements and Legal Opinions From the Department of Justice" (1995) 10:2 *Native Studies Review* 121 at 121.

very strong view to their being respected. This historical record also shows that the Dominion government viewed treaties as paramount over provincial or territorial regulations. The fact that treaty rights to hunt were included in the *NRTA* is proof of the view that the Dominion government viewed them as important, and also indicates that a constitutional obligation to look out for the interests of First Nations was recognized. The records show that what was on the minds of Dominion officials was the need to protect First Nations access to wildlife. They wanted First Nations hunters to be free from starvation so that they would not have to provide rations. Dominion officials were also aware that there had been provincial encroachment upon First Nations hunting. They were aware that they owed some sort of a fiduciary-like duty. Historical research can provide important extrinsic evidence for courts to get a fuller understanding when interpreting text of treaties or statutes such as the *NRTA*. Courts have been known to come to new decisions based on novel arguments and/or new historical evidence. Indeed, the SCC was generally unanimous in deciding in *Horseman*, after considering the historical evidence of an expert witness, that there was a commercial aspect to the Treaty 8 treaty hunting rights.[8]

The problem is that the courts have not given a broad liberal reading of the text in s. 12. Rather, they have focused on the words "for

[8] *R. v. Horseman*, [1990] 3 C.N.L.R. 95

food" in the proviso. Justice McGillivray in the 1932 *Wesley*[9] case overturned the conviction of a Stoney Indian hunter on the basis that s. 12 of the NRTA provided Indians hunting for food protection from the provincial game laws. Justice McGillivray focused on the words "for food" because the appellant Mr. Wesley had killed a deer for food. Nevertheless, he took a broad approach to interpreting s. 12 and looked at the wider historical and political context and considered extrinsic evidence.[10] Justice McGillivray was pleased that he was able to come to his conclusion without having "to decide that 'the Queen's promises' have not been fulfilled."[11] He sought to ensure that the honour of the Crown was upheld by giving respect to the treaty promise to protect their traditional livelihood. The approach taken by McGillivray J. led one commentator to state "the presentation or organization of the historical material was new" and the "theme of the vindication of British colonial policy – the upholding of the Queen's word – is striking."[12] Although Justice McGillivray had concerns about making a decision where the Queen's promises, embodied in the treaties, had not been fulfilled, other judges were not so concerned about justifying broken promises.

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[9] *R. v. Wesley*, [1932] 2 W.W.R. 337

[10] Justice McGillivray reviewed the Articles of Capitulation of 1760; the Treaty of Paris of 1763; the Royal Proclamation of 1763; the *St. Catherines Milling* decision; *A.G. Canada v. A.G. Quebec and A.G. Ontario* decision; the *Dominion of Canada v. Ontario* decision; documents relating to the Rupert's Land transfer; and the Treaty Commissioner's report to gain a clearer understanding of the basis of Aboriginal rights as well as the promises made in Treaty 7.

[11] *R. v. Wesley, supra*, note 9 at 353.

[12] Douglas Sanders, "The Queen's Promises" in Louis Knafla, ed., *Law and Justice in a New Land: Essays in Western Canadian Legal History* (Toronto: Carswell, 1986) 101 at 106.

The focus on the words "for food" in the s. 12 hunting clause in the NRTA led to the interpretation of s. 12 having extinguished any commerce aspect of First Nations hunting rights. The courts have developed a "merger and consolidation" theory where they reasoned that s. 12 of the NRTA merged and consolidated the treaty right into what the text of s. 12 provides, that is, what they determined to be only a right to hunt for food by focusing narrowly on the proviso and the words "for food." Justice McNiven in the *Strongquill*[13] case in 1952 was the first to use the term "merged and consolidated" when he stated "[paragraphs] 10, 11 and 12 of the [NRTA] refer to Indians and with respect to the matters therein dealt with the rights heretofore enjoyed by the Indians whether by treaty or by statute were merged and consolidated."[14] This was the first case to use the term "merged and consolidated", yet many judges would refer to this term. The SCC picked up on the term in the *Frank*[15] decision when Justice Dickson stated "It would appear that the overall purpose of para. 12 of the NRTA was to effect a merger and consolidation of the treaty rights heretofore enjoyed by Indians ... "[16] The SCC continued to use the term "merge and consolidate" in its decisions on into the 1980s.[17]

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[13] *R. v. Strongquill* (1952) 8 W.W.R. 247.
[14] *Ibid.* at 267.
[15] *Frank v. The Queen* [1978] 1 S.C.R. 95.
[16] *Ibid.* at 100.
[17] *R. v. Sutherland* [1980] 2 S.C.R. 451; *Moosehunter v. R.* [1981] 1 S.C.R. 282.

The first opportunity for the SCC to revisit s. 12 of the NRTA after the 1982 entrenchment of s. 35(1) Aboriginal and treaty rights was the *Horseman*[18] decision. However, s. 35(1) was not argued in this case. The SCC convicted a Treaty 8 Indian who killed a grizzly bear in self defense and sold the hide (after purchasing a license) in order to feed his family. Defense counsel argued that the term "usual vocations" in the Treaty 8 hunting clause protected the livelihood practiced at the time Treaty 8 was negotiated, which included the trading and bartering of game animals. Although the trial judge was convinced by the historical evidence and the testimony of an expert witness, the SCC upheld the Queen's Bench Justice's decision to set aside the trial judge's acquittal and upheld the conviction by reasoning that s. 12 of the NRTA merged and consolidated the treaty right. Thus, Justice Cory held that the commerce aspect of the treaty hunting right was extinguished and attempted to justify the breach of the Queen's promises by arguing that there was a *quid pro quo*, a trade off, where the hunting area was enlarged to the whole province in return for the unilateral taking away of the commerce aspect of the hunting right.

Madame Justice Wilson wrote the dissent in the *Horseman* decision and represented three of the seven judges who decided the

[18] *R. v. Horseman*, [1990] 3 C.N.L.R. 95. For a commentary on this case see Frank Tough, "Introduction to Documents", *supra*, note 7, and Catherine Bell, "Reconciling Powers and Duties: A Comment on Horseman, Sioui and Sparrow" (1990) 2:1 *Constitutional Forum Constitutionnel* 1.

case.[19] She took a large and liberal approach to interpreting s. 12 of the NRTA in contrast to Cory J. She reasoned that the principles of interpretation regarding Aboriginal and treaty rights required a liberal interpretation with any ambiguities going in favour of First Nations. She held that Treaty 8 was a "solemn agreement" which First Nations leaders entered into only after assurances had been made to them by the Treaty Commissioners that the laws of the Crown would be for the protection of their traditional way of life. Madame Justice Wilson interpreted the words hunting "for food" broadly enough to include the special circumstances of Mr. Horseman who did not hunt the bear for the purpose of commerce, but shot it only after the bear attacked him. He had no intention of selling the hide when he took it home and sold it only after he was in dire financial straits and needed the money to buy food for his family. It should be noted however, that although Madame Justice Wilson took a liberal approach, she still focused on the term "for food". She was likely mindful of the weight of precedent and the previous decisions, which had focused analysis on the words "for food".

The SCC revisited the *NRTA* hunting clause again in the *Badger*[20] decision and the majority this time rejected the merger and consolidation theory. This time the SCC considered arguments involving s. 35(1) protected rights and found that the treaty rights to hunt were not merged

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[19] *Ibid.* at 108.

[20] *R. v. Badger* [1996] 2 C.N.L.R. 77. For a critical discussion of this decision see Catherine Bell, "R. v. Badger: One Step Forward and Two Steps Back?" (1997) 8:2 *Constitutional Forum Constitutionnel* 21.

and consolidated into s. 12 of the *NRTA* and could still exist, so long as they did not conflict with the *NRTA*. The majority decision written by Justice Cory held that the "for food" aspect of the treaty right still existed as it did not conflict with the *NRTA*, but held that the commerce aspect of the treaty right no longer existed because it conflicted with the words in s. 12 of the *NRTA*, that is, the words "for food." This is a curious conclusion since a plain reading of the words in s. 12 illustrates that commerce hunting and sport hunting were likely contemplated by the drafters of the clause. Indeed, the word "trapping" connotes a commercial venture. Further, the preamble set out the purpose as securing a supply of game and fish "for their support and subsistence", not just for their subsistence, that is, not just for food purposes. The historical record in this study supports the conclusion that trapping and market were encouraged during the study period. Thus, hunting for commerce would have been a factor considered.

Nevertheless, with the *Badger* decision, the SCC again held that the effect of s.12 of the *NRTA* on the treaty promises to continue their livelihood was to extinguish the commerce aspect. The SCC did however, take somewhat of a broader approach when it considered the wording relating to where First Nations hunters could hunt. Section 12's proviso allows First Nations unregulated hunting for food on "unoccupied Crown lands and on any other lands to which the said Indians may have a right

of access."[21] The court looked at extrinsic evidence, including the oral testimony of Treaty 8 Elder, Dan McLean and an historian as expert witness to conclude that at the time of the Treaty 8 negotiations, the First Nations leaders would have understood the term occupied lands to mean fur trade posts, police posts, missions, farms and other settlements, which were clearly put to visible use. Idle lands, whether privately owned or not, would have been understood by the First Nations hunters as unoccupied lands to which they would have a right of access. Thus, the SCC, although narrowly focusing on the term "for food", nevertheless took a more liberal approach to analyze the scope of that right. Courts are still following earlier precedents by focusing on the words "for food" and neglecting to focus on the whole clause, especially its preamble wording and the main part of the clause. By narrowly focusing on the proviso and being stuck on the words "for food", the courts have consistently found little problem concluding that the commerce aspect was extinguished.

The problem with this interpretation of s. 12 is that it conflicts with legal principles set down by the SCC regarding the interpretation of Aboriginal or treaty rights. In *Sparrow*[22] the SCC considered for the first time, the content of s. 35(1) rights. It determined that the Aboriginal and treaty rights of Aboriginal peoples required an understanding of the

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[21] Section 12, *NRTA, 1930, supra*, note 4.

unique relationship between the Crown and Aboriginal peoples. The SCC saw the federal Crown as being in a fiduciary relationship with the Aboriginal peoples of Canada and that it had to look out for the interests of Aboriginal peoples. The relationship was to be non-adversarial and no sharp dealing on the part of Crown representatives was to be tolerated by the Court. Legislation or actions by the Crown affecting Aboriginal peoples must uphold the honour of the Crown. The rights entrenched in the *Constitution* pursuant to s. 35(1) received the protection of the highest law of the land, however, these rights were not absolute. They could be limited by a justifiable legislative objective. The court developed a test to determine if a right exists, whether it was infringed by government laws or actions, and if so, whether such infringement could be justified. In order for a legislative scheme to be justified, a valid legislative objective would have to be proven by the Crown and the legislative scheme would have to uphold the honour of the Crown by taking the constitutional rights into account by giving First Nations priority over other users and consulting with the First Nations before implementing the legislation.

An important point for our purposes, is that the SCC held that in order for a right to be existing, it must not have been extinguished by government legislation. The court held that a right could be heavily

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[22] *R. v. Sparrow* [1990] 3 C.N.L.R. 160. For commentary on this case see Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow" (1991) 29 *Alberta Law Review* 498.

regulated and still not be extinguished because in order for an Aboriginal or treaty right to be extinguished, there had to be a "clear and plain intention" to extinguish that right. This would essentially require express wording, which stated such rights have been extinguished. However, the courts have also held that a "clear and plain" intent to extinguish can also appear where there is no reasonable alternative interpretation.[23] Justice Lambert of the British Columbia Court of Appeal illustrates the high threshold required to find a clear and plain intention when he stated in *Delgamuukw* "Since the intention to extinguish must be clear and plain, I would be very reluctant to reach the conclusion that there had been implicit extinguishment in any particular case ... "[24]

What the clear and plain intention test does is provide a very high burden of proof for the Crown to make out any claim that a particular Aboriginal or treaty right is extinguished. When we look at s. 12 of the *NRTA* and apply the strict clear and plain intention test, along with the plain reading I discussed above, one is hard pressed to find any clear and plain intention to extinguish. Not only that, there is also ambiguity, which is to be decided in favour of the Aboriginal people claiming the

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[23] *Delgamuukw v. B.C. (A.G.)* [1993] 5 W.W.R. 97 (B.C.C.A.) Justice McFarlane at 147 analyzed the origins of the clear and plain test in the common law and coupled it with the fiduciary duty of the Crown to conclude that "the honour of the Crown, arising from its role as the historic protector of aboriginal lands, requires a clear and plain intention to extinguish aboriginal title that is express or manifested by unavoidable implication."

[24] *Ibid.* at 300.

right.[25] Further, the clear and plain intention to extinguish on the part of the Crown fails if there is a reasonable alternative interpretation. I described above that there is another reasonable alternative to the interpretation that the commerce aspect of the treaty hunting right was extinguished. Indeed, s. 12 provides that Indians hunting other than for food (ie, for commerce or for sport) will be subject to the provincial game laws, but when hunting for food purposes will not be. This is expressed in clear language. The drafters of this clause would not make it a two part clause if they had only hunting "for food" in mind. If that was their intent, they would have drafted only the proviso as the entire clause. Instead, they drafted a main clause with a proviso, that is, a two part clause with a preamble setting out the purpose. The drafters intended that provincial laws would apply to Indians involved in commerce [and sport] hunting "in order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence."[26] The drafters did not expressly state that the right to hunt for commerce purposes is hereby extinguished. Such an interpretation is not "manifested by unavoidable implication."[27] Thus, this is still an open issue which will likely be reconsidered by the courts at some time in the future.

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[25] *R. v. Taylor and Williams* [1981] 3 C.N.L.R. 114 at 123 and *Nowegijick v. The Queen* [1983] 2 C.N.L.R. 89 at 94.
[26] Section 12, *NRTA, 1930, supra*, note 4.
[27] *Delgamuukw, supra*, note 23.

What this legal historical study may help provide is a better understanding of the regulatory regime in place leading up to the negotiations of the *NRTAs*. Unlike Justice McGillivray, most judges have not taken a broader historical approach to seek a better understanding of the solemnity of the Queen's promises and the protection afforded those rights in the *NRTA*. This study is by no means intended to be an exhaustive treatise of the regulatory regime in western Canada before 1930. Rather it is one small concentrated study which I hope inspires others to carry out similar research. More studies of the social, economic, political and legal historical context around game regulation development would be useful for courts as well as for game managers so that they might get a better understanding of why First Nations people get so emotional about their treaty rights – why they feel angry when courts decide that the Queen's promises do not mean enough to be respected by the Canadian state.

In none of the delegations of power discussed in this study, (s. 133 [later s. 66] of the Indian Act; s. 12 of the NRTA; and s. 87 [later s. 88] of the Indian Act) were First Nations ever consulted. Such steps were taken unilaterally by the federal government. This can be viewed as a breach of the fiduciary-like duty that the Department of Indian Affairs owed First Nations. This is so because all these delegations of powers have led to increased limitations on First Nations ability to exercise their rights promised by the Queen's representatives. Since First Nations were not

properly consulted during the negotiations of the *NRTAs*, it is imperative for the courts to look at the historical context and extrinsic evidence around the treaty rights being protected within s. 12. The courts need a better understanding of the treaty right to hunt and the regulatory regime at this time so that they fully understand the rights s. 12 was providing constitutional protection for.

The Dominion Government had a constitutional obligation pursuant to s, 91(24) to look out for the interests of First Nations. They had a further duty resulting from their role in the treaty relationship. First Nations dealt with Dominion Crown representatives during treaty negotiations. It is the Dominion Crown that owes a continuing duty to First Nations. They cannot delegate that duty fully away. They may share that duty if they delegate. But they cannot transfer it away. Like Justice Stuart stated in the *Stoney Joe* case, the Superintendent General of Indian Affairs had an ongoing duty to review regulations before they could be made applicable to First Nations hunters.[28] By allowing for the situation where provincial regulations could interfere with First Nations traditional livelihoods, the Dominion breached its duty to look out for the interests of First Nations. By failing to consult with the First Nations before delegations of power occurred, they also breached their duty to First Nations. By allowing provincial game regulations to apply and infringe First Nations treaty rights, they also breached their treaty-based

[28] *R. v. Stoney Joe*, *supra*, note 1.

duty to First Nations. The test for Crown conduct at this time derives from the treaty relationship. Treaties were solemn agreements and it is a legal principle that we should assume the Crown always intended to keep its solemn commitments. Indeed, they made solemn assurances to the Chiefs and Headmen to induce them to sign treaties – assurances that only game laws in the Indians interest and necessary for conservation of the game would be made. Any derogation of treaty promised rights on the part of the federal government should be deemed as a breach of their fiduciary-like duty. This also applies in situations of delegated powers. Any infringements of the treaty promised rights by the territorial or provincial governments are breaches on the part of the provincial and federal levels of government since the federal government can never fully delegate its powers (and its duties) away.

When a delegation of powers occurred, such as in s. 12 of the *NRTA*, the fiduciary duty was also passed along. Since the federal government can only delegate and not derogate, it would have a continuing fiduciary duty. But, since some of the powers passed to the provincial governments, they would have assumed the role of fiduciary and would have to act with the interests of the First Nations in mind when legislating hunting. Legislating hunting for the interests of First Nations is consistent with the preamble in s. 12 insuring the supply of game for Indians as well as with the treaty promise that only such laws

as were necessary for the conservation of game and in the interests of the Indians would be made.

Taking these legal principles together – treaty rights are constitutionally protected rights by virtue of s. 35(1); treaties were solemn agreements and it should be assumed that the Crown representatives intend to live up to their agreements; there is a fiduciary duty owed by Crown representatives [both federal and provincial] to the First Nations; treaty rights deserve a large and liberal interpretation and any ambiguity must be decided in favour of the the Aboriginal group making the claim; treaties include more than what was written in the text; the Aboriginal understanding must be considered and given weight; extinguishment requires a clear and plain intention[29] – one can see that there is much in the interpretation principles which can assist the courts in interpreting Aboriginal and treaty rights. Yet courts have not always given a broad liberal interpretation as the s. 12 line of cases illustrate. With historical studies such as this one, we may get a clearer understanding of what the intention of the drafters of such laws were or at least what the issues were that were on their minds at the time. The new legal history approach provides for a social history around the enforcement of regulations to provide further insights into the relationships between the law and those upon whom it is imposed and how it affects them or is affected by them. Section 12 of the NRTA ought

to be revisited in light of this growing understanding of the pre-1930 regulatory regime and the historical context of the time.

The legal history of game legislation and its effect on various user groups also has contemporary significance. Indeed, as stated at the outset of this study, hunting rights are taken very seriously by First Nations today and are often litigated. Besides the cultural and economic importance to hunting for First Nations, there is also great symbolic significance to a victory in court over treaty rights.

One can look at the recent SCC decision in *Marshall*[30] as an example of the contemporary significance of treaty rights to a traditional livelihood and the competition with other resource user groups. The Supreme Court held that the Mi'kmaq First Nations had an existing treaty right to take fish and eels, including the right to barter and trade such products. Justice Binnie writing for the majority reasoned that the actual agreement reached between the First Nations leaders and the Crown representatives in 1760 and 1761 was not recorded in the text of the treaty. Therefore the courts must look beyond the strict wording and consider extrinsic evidence. A restrictive clause providing the Mi'kmaq the right to trade their wildlife products at truck houses was interpreted as the basis for a right to hunt, fish and gather. Binnie J. found that

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[29] Leonard Rotman, "Taking Aim at the Canons of Treaty Interpretation in Canadian Aboriginal Rights Jurisprudence" (1997) 46 *U.N.B.L.J.* 11 gives an overview of these interpretation principles.
[30] *R. v. Marshall* [1999] 4 C.N.L.R. 161.

this right was not extinguished even though the truck houses and licenses no longer existed. Justice Binnie reasoned that there was something more to the treaty entitlement than merely the right to bring fish and wildlife to the truck houses. The common intention of the two parties was for the Crown representatives to make assurances that the Mi'kmaq would have contined access to the fish and wildlife for food and trade. Any other interpretation would not uphold the honour and integrity of the Crown in its dealings with First Nations. The existing treaty right included a right to trade or barter fish and wildlife for "necessaries" which Binnie J. defined as a "moderate livelihood."[31] Since the fisheries regulations did not provide any regulations giving direction to the Minister of Fisheries as to how to exercise his discretionary authority in a way which would respect the treaty rights of the Mi'kmaq there was a *prima facie* infringement of those rights. Since there was no evidence provided on the part the Crown showing justification, Mr. Marshall was acquitted.

The non-Aboriginal backlash to this decision was extreme. Property was destroyed, protests were staged and violence erupted.[32] The rhetoric of the non-Aboriginals to the special treaty rights of the First Nations to the wildlife resources were very similar to the rhetoric voiced in this study. First Nations people were viewed as a dangerous threat to

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[31] *Ibid.* at 192.

[32] Rick Maclean, "Fishing Fury" *CBC News Online*: http://www.newsworld.cbc.ca and see also Canadian Press, "Lobster Battle Brought to a Boil" *Calgary Herald* (17 October 1999) A4.

the wildlife populations. Public cries for equal application of game or fisheries laws were made, totally disregarding the special rights of First Nations as promised in the treaties. When First Nations are viewed as competition to scarce resources and "painted blacker" as a serious threat to the resources, special rights are viewed as somehow unworthy of respect. Their *sui generis* rights are seen as unfair by the non-Aboriginal population. The unique historical and constitutional position of First Nations is easily ignored in such times. What is ironic is that the non-Aboriginals who oppose treaty rights feel there is nothing wrong with breaching contracts or agreements. Fulfillment of agreements is a fundamental principle of our legal system and our economy. Yet they see little problem with Canada not honouring its treaty promises. They often view treaties as dusty old documents with no useful utility. They have little understanding of the way First Nations view them as living documents of contemporary significance and forming the basis of the relationship between themselves and the rest of Canada.

Violent backlashes like the maritime backlash in the wake of the *Marshall* decision are not unknown. The fisheries cases of the great lakes and Fraser River prompted similar reactions by non-Aboriginal people. Similar rhetoric was utilized by the non-Aboriginal population which viewed First Nations rights as a serious threat to their use.[33] For example, Charles E. Cleland described some of the non-Aboriginal

reaction to a victory for Ottawa and Ojibway (Chippewa) First Nations in an American court.[34] He stated that:

> Michigan Indians faced many hostile and occasionally violent confrontations with sportsmen. Fishing access points were blocked; boats, nets and vehicles were damaged or destroyed; and threats were made against Indian fishermen. This abuse extended to non-fishing Indians and to Indian children in school, thereby creating a nasty anti-Indian mood that in many quarters has not abated.[35]

Cleland also described some of the anti-Aboriginal backlash to another victory upholding Lake Superior Ojibway treaty rights to harvest game and fish in Wisconson. The victory was met with "well-organized opposition from sportsmen, resort owners and a sizeable group of anti-treaty advocates."[36] Crowds of hundreds of people protested the annual traditional spearing sessions of the First Nations by exhorting racist slurs such as "Save a Walleye, Spear an Indian", "Spear a Pregnant Squaw and Save Two Walleyes".[37] Such anti-Aboriginal rhetoric, steeped in blatant racism and ignorance, lies just below the surface of our society. The conflict over scarce resources can bring this quickly to the surface.

We have a duty as lawyers and as Canadian citizens to take the appropriate steps to ensure this violent and racist behavior does not

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[33] See eg. D.R. Hudson, "Fraser River Fisheries: Anthropology, the State, and First Nations" (1990) 6:2 *Native Studies Review* 31.
[34] Charles E. Cleland, "Indian Treaties and American Myths: Roots of Social Conflict Over Treaty Rights" (1990) 6:2 *Native Studies Review* 81.
[35] *Ibid.* at 83
[36] *Ibid.* at 84.
[37] *Ibid.*

surface. What is required is for our society to gain a fuller understanding of Aboriginal and treaty rights and the special historical and constitutional position of First Nations people in Canada. Historical studies such as this one can assist in such an endeavor. What is also required is to foster a new relationship between First Nations and the rest of Canadian society. This new relationship would respect the unique circumstances of Canada's First Peoples and allow for them to be partners in Canada's growth and development.

Historical studies that examine the special relationship First Nations have with the rest of society can be useful to counter the swings in popular attitudes. The awareness of treaty negotiations, treaty promises and the "spirit and intent" of treaties would also help. Furthermore, empirical studies showing the contributions made by First Nations to the history and growth of our country are also necessary. Ongoing studies can monitor the poverty status of many First Nations people and determine whether improvements are being made. Philosophical studies can also assist in making normative arguments for why First Nations ought to have special rights. Indeed, Will Kymlicka made a liberal defense of Aboriginal rights and counters those who argue that recognition of Aboriginal rights is 'racist', by stating:

> **The main difference, I've argued, is that Aboriginal peoples of Canada, unlike the racists, face unequal circumstances even before they make their choices about which projects to pursue. Unlike White-Canadians, the very existence of their cultural Communities is vulnerable to the decisions of the non-Aboriginal**

majority around them.[38]

Kymlicka made the Rawlsian argument that the least advantaged in society ought to have the most assistance and protection from society. Besides the most-disadvantaged argument, there is a moral and legal basis for recognizing special Aboriginal rights by the historical fact that First Nations were self-governing entities in North America when the European Princes began to make claims of sovereignty over these areas.

It is on the basis of prior occupancy by First Nations, that our common law has developed to recognize Aboriginal rights. Treaties were entered into in recognition of prior rights to the land. Treaties have reserved some of those rights, such as the right of access to hunt, fish and gather. Use of unoccupied lands which have the effect of seriously restricting First Nations access to the wildlife is arguably an unjustifiable infringement of treaty rights.[39]

SCC cases have moved toward increased clarification of the nature and scope of Aboriginal rights. As Thomas Issac stated:

> ...there is reason to hope. The Supreme Court may be the messenger of that hope and through its words might send a strong message to the Canadian government and the Canadian people that aboriginal rights are here to stay and that they must be dealt with.[40]

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[38] Will Kymlicka, *Liberalism, Community and Culture* (New York: Oxford University Press, 1989) at 241.
[39] Monique M. Ross and Cheryl Y. Sharvit, "Forest Management in Alberta and Rights to Hunt, Trap and Fish Under Treaty 8" (1998) 36:3 *Alberta Law Review* 645.
[40] Thomas Issac, "The Honour of the Crown: Aboriginal Rights and the Constitution Act, 1982; The Significance of R. v. Sparrow " (1992) *Policy Options* 22 at 24.

Ultimately, we must take Chief Justice Lamers' judicial advice in *Delgamuukw* [41] and work to bring the competing sides together, since we are all here to stay - nobody is going anywhere. We must continue to reconcile the sovereignty of the Crown with the fact that Aboriginal peoples were here first and that they have legitimate claims to special rights as a result. With respect to First Nations hunting, these rights ought to be given full respect in any legislation regarding the management of game. Provincial legislation must also uphold the honour of the Crown. First Nations have had to adjust its economic activities and in turn have had to adjust their values in many important respects.

In keeping with the new relationship referred to in the Royal Commission on Aboriginal Peoples between Canadian society and its Aboriginal populations, the non-Aboriginal population ought also to adjust its values to some extent to accommodate Aboriginal values and perspectives. Something akin to a partnership ought to be pursued. In that vain, First Nations ought to be more fully involved in the management of game. Justice Kerans of the Alberta Court of Appeal in *Badger*[42], stated his dismay at the state of provincial game legislation in Alberta which allowed for no Aboriginal participation:

> **The treaties enjoined them to accept responsibility for conservation of game. The current law tells them they have no responsibility, and no role, in that area. I would have thought the better regime is one where they are invited to accept, with others, the responsibility for game management. But the current law tells both Alberta and its Aboriginal**

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[41] *Delgamuukw v. British Columbia* [1998] 1 C.N.L.R. 14 (S.C.C.).

[42] *R. v. Badger* [1993] C.N.L.R. 143 (Ab.C.A.)

> populations that they need not, indeed cannot, work together in this area.[43]

Of course, they can work together if both sides make adjustments. Besides both sides making adjustments, that is, First Nations and provincial resource managers, the public must also change its attitudes. Rick Ponting found in a survey of Albertan's attitudes that there was "widespread lack of confidence in aboriginal managerial abilities" with respect to natural resources and revenues.[44] Nevertheless, Aboriginal participation in resource management is a worthy goal.

Co-management of resources has been advocated by prominent academics such as Peter Usher, who argues that Canada's Aboriginal peoples ought to play a role in wildlife resource management:

> However, guaranteed rights of access, even on an exclusive or preferential basis, are not sufficient. The right to hunt in an inanimate landscape is clearly not a useful one. If Native northerners are to defend their essential interests in their resource base, and the environment that sustains it, then they will have to have property and management rights in wildlife. I suggest that this broader understanding of Aboriginal rights also serves the interest in conservation.[45]

It is reasonable to think that if Aboriginal Peoples played a more direct role in resource management, they would also take more interest in its conservation. First Nations hunters, fishers and gatherers generally have an intimate knowledge of their environment and could provide

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[43] *Ibid.* at 153.

[44] J. Rick Ponting, "Albertan's Attitudes Toward Aboriginal People on Natural Resource Development Issues" (1993) 3:2 *Alberta* 67 at 81.

[45] Peter J. Usher, "Indigenous Management Systems and the Conservation of Wildlife in the Canadian North" (1987) 14:1 *Alternatives* 3 at 6.

useful information and expertise for wildlife management purposes. Indeed, as Murray Wagner has argued:

> In the relationships between aboriginal peoples and the rest of Canadian society, it should be biologists, trappers, hunters and fishers who make the decisions about harvesting living resources. One would suppose, after all, that these people would have the best idea of the condition of local ecosystems and animal populations. Unfortunately, ... it is the law - legislation, lawyers, judges and the accompanying bureaucracy of two levels of government - that has determined, to a great extent, what access aboriginal people may have to natural resources.[46]

Thus, if First Nations and other Aboriginal groups could play a significant role in resource management in their traditional hunting territories, their interests would be better protected and would likely better serve the interests of conservation of the game animals. There would likely be more respect given to First Nations rights and concerns which in turn could lead to less conflict with the justice system or with other user groups.

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[46] Murray W. Wagner, "Footsteps Along the Road: Indian Land Claims and Access to Natural Resources" (1991) 18:2 *Alternatives* 23 at 23-24.

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APPENDIX A

List of First Nations brought under the Territorial Game Laws by virtue of a Public Notice pursuant to s. 133 of the *Indian Act* as of January 1, 1894

Name of First Nation	Location of Reserve	Agency
Enoch	Birdtail Creek	Birtle
Oak River	Oak River	Birtle
Oak Lake	Oak Lake	Birtle
Kah0do-min-ie	Turtle Mtn.	Birtle
Pheasant Rump	Moose Mtn.	Moose Mtn.
Striped Blanket	Moose Mtn.	Moose Mtn.
White Bear	Moose Mtn.	Moose Mtn.
O-Chah-pow-ace	Round Lake	Crooked Lake
Kah-kee-wis-ta-haw	Round Lake	Crooked Lake
Cow-ess-ess	Crooked Lake	Crooked Lake
Sakimay	Crooked Lake	Crooked Lake
Pia-pot	Qu'Appelle Valley	Muscowpetung
Carry the Kettle	Indian Head	Assiniboine
Standing Buffalo	Qu'Appelle Lakes	Muscowpetung
Pasquah	Qu'Appelle Lakes	Muscowpetung
Muskowpetung	Qu'Appelle Valley	Muscowpetung
Pee-pee-kee-sis	File Hills	File Hills
Okanese	File Hills	File Hills
Star Blanket	File Hills	File Hills
Little Black Bear	File Hills	File Hills
Muscow-e-quan	Ltle. Touchwood Hills	Touchwood Hills
Day Star	File Touchwood Hills	Touchwood Hills
Poor Man	Touchwood Hills	Touchwood Hills
One Arrow	Batoche	Duck Lake
Okomanis	Duck Lake	Duck Lake
Beardy	Duck Lake	Duck Lake
John Smith	South Saskatchewan	Duck Lake
Red Pheasant	Eagle Hills	Battleford
Stoney	Eagle Hills	Battleford
Moosomin	Jackfish Creek	Battleford
Sweet Grass	Battle River	Battleford
Poundmaker	Battle River	Battleford
Thunderchild	Battle River	Battleford
Little Pine	Battleford	Battleford
Lucky Man	Battleford	Battleford
See Kas Koots	Onion Lake	Onion Lake
Michel	Sturgeon River	Edmonton

Enoch La Potac	Stoney Plain	Edmonton
Ermineskin	Bear's Hill	Hobbema
Sampson	Bear's Hill	Hobbema
Bobtail	Battle River	Hobbema
Louis Muddy Bull	Battle Lake	Hobbema
Bull's Head	near Calgary	Sarcee
Old Sun	Bow River	Blackfoot
Eagle Tail	Old Man's River	Piegan
Red Crow	Belly River	Blood

**Stragglers

at Medicine Hat, Maple Creek, Moose Jaw and Swift Current

Source: Indian Affairs (RG 10, Volume 6732, file 420-2)

APPENDIX B

List of Name of First Nation brought under the Territorial Game Laws by virtue of a Public Notice pursuant to s. 133 of the *Indian Act* as of January 1, 1895.

Name of First Nation	Location	Agency
Stoney	Morleyville	Morley

Source: Indian Affairs (RG 10, Volume 6732, file 420-2)

APPENDIX C

List of First Nations brought under the Territorial Game Laws by virtue of a Public Notice pursuant to s. 133 of the *Indian Act* as of July 1, 1903

Name of First Nation	Location of Reserve	Agency
Yellow Quill	Nut & Fishing Lake	Touchwood Hills
Kinistino	Melfort	Touchwood Hills
Cote	Assiniboine River	Pelly
Key	Assiniboine River	Pelly
Keeseekouse	Assiniboine River	Pelly
James Smith	Fort a la Corne	Duck Lake
Cumberland	Fort a la Corne	Duck Lake
Chipewyan	Cold Lake	Onion Lake
Alexander	near Sandy Lake	Edmonton
Joseph	Lac Ste Anne	Edmonton
Paul	White Whale Lake	Edmonton
Wm. Twatt	Sturgeon Lake	Carlton
Petequakey	Muskeg Lake	Carlton
Mistawasis	Snake Plain	Carlton
Ah-tah-ka-koop	Sandy Lake	Carlton
Kenemotayo	Stony & Whitefish Lake	Carlton
Wah-pa-ton (Sioux)	Round Plain	Carlton
Saddle Lake	Saddle Lake	Saddle Lake
Blue Quill	Saddle Lake	Saddle Lake
James Seenum	Saddle Lake	Saddle Lake
James Seenum	(Goodfish and Whitefish Lake)	Saddle Lake
Moose Woods (Sioux)	The Moose Woods	

Source: Indian Affairs (RG 10, Volume 6732, file 420-2)